Supreme Court, U.S.
FILED

03 351 SEP 2 2003

IN THE

Supreme Court of the United States

REGGIE AND REBECCA B., TAMMY G.,
ELAINE R. and RACHEL C.,

Petitioners,

v.

JEB BUSH, as the Governor of the State of Florida, *et al.*,

Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Karen Gievers
GIEVERS, P.A.
524 East College Avenue, Suite 2
Tallahassee, Florida 32301
850-222-1961

Marcia Robinson Lowry
Counsel of Record
Eric E. Thompson
Douglas C. Gray
CHILDREN'S RIGHTS, INC.
404 Park Avenue South
Eleventh Floor
New York, New York 10016
212-683-2210

(Additional Counsel On the Reverse)

166 PP

William H. Fraser
LEGAL AID SOCIETY OF
PALM BEACH COUNTY, INC.
423 Fern Street, Suite 200
West Palm Beach, Florida 33401
561-655-8944

Bernard P. Ferlmutter
Carolyn Salisbury
UNIVERSITY. OF MIAMI
SCHOOL OF LAW
5915 Ponce de Leon
Boulevard #28
Coral Gables, Florida 33146
305-284-3123

Christina A. Zawisza
CHILD ADVOCACY CLINIC
THE UNIVERSITY OF MEMPHIS
SCHOOL OF LAW
109 North Main Street, 2nd Floor
Memphis, Tennessee 38103
901-523-8822

ROY WASSON
210 South Dixie Highway
Suite 450
Gables One Tower
Miami, Florida 33146
305-666-5053

Deborah A. Schroth
FLORIDA LEGAL SERVICES
126 West Adams Street, #502
Jacksonville, Florida 32202
904-355-5200

QUESTION PRESENTED

Petitioners are foster children in the custody of the State of Florida seeking to compel executive branch officials of the state to treat them in accordance with the United States Constitution. The district court determined that *Younger* abstention was required due to petitioners' periodic review proceedings in state juvenile court and the Eleventh Circuit affirmed. The question presented for review is:

Whether the court of appeals' *Younger* abstention ruling was improper where the prospective injunctive and declaratory relief sought by petitioners is directed solely at executive branch officials and will not enjoin or otherwise result in federal court control over periodic state juvenile court review proceedings in which petitioners are otherwise unable to vindicate their constitutional rights?

PARTIES TO THE PROCEEDING

Petitioners Reggie and Rebecca B., Tammy G., Elaine R. and Rachel C. (plaintiffs-appellants below) – all foster children who have been adjudicated dependent and placed in the custody of the State of Florida's Department of Children and Family Services (the "Department") – are the five of twenty-two original named plaintiff foster children who have not settled all of their claims or exited the foster care system since the filing of the amended complaint in August 2000. Petitioners, on behalf of themselves and a putative class of Florida foster children, allege widespread constitutional deficiencies in the state's provision of foster care services and seek prospective declaratory and injunctive relief to remedy these systemic deficiencies and protect them from ongoing harm.

Respondents (defendants-appellees below) – the Florida executive branch officials who operate the state's foster care system – are sued in their official capacities only. They are Governor Jeb Bush; Commissioner of the Department, Jerry Regier (formerly Kathleen Kearney); and thirteen of the Department's fourteen sitting District Administrators: Charles Bates, Robert Williams, Ester Tibbs, Nancy Dreicer, Lynn Richard, Jr., David Dennis, Mike Murphy, Ted Simpkins, Charles Hood, III, Ron Zychowski, Beth Englander, Cynthia Schuler, and Vern Melvin.

TABLE OF CONTENTS

Page

Question Presented i

Parties to the Proceeding ii

Table of Authorities v

Petition for a Writ of Certiorari 1

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 2

Statement of the Case 2

A. Introduction 2

B. The State's Foster Care System 4

C. Petitioners' Federal Claims and Relief Sought 9

D. Proceedings Below 11

Reasons for Granting the Petition 14

1. The Writ Should Be Granted To Correct The Eleventh Circuit's Extension Of *Younger* Abstention Beyond This Court's Prior Limitations 15

2. The Writ Should Be Granted To Resolve Splits Among The Circuit Courts 23

Conclusion 29

Appendix A (court of appeals opinion) 1a

Appendix B (district court opinion) 45a

Appendix C (rehearing denial) 95a

Appendix D (excerpt from amended complaint) 97a

Appendix E (provisions involved) 101a

TABLE OF AUTHORITIES

Page

CASES:

Boyle v. Landry, 401 U.S 77 (1971) 18

Crawley v. Hamilton County Com'rs,
744 F.2d 28 (6th Cir. 1984) 24

Cohens v. Virginia, 19 U.S. 264 (1821) 15

Colorado River Water Conservation Dist. v. United States,
424 U.S. 800 (1976) 16

Dep't Health and Rehab. Servs. v. B. J. M.,
656 So. 2d 906 (Fla. 1995) 8, 9

Dep't of Children & Family Servs. v. I. C.,
742 So. 2d 401 (Fla. Dist. Ct. App. 1999) 9, 10

Dep't of Children and Families v. J. H.,
831 So. 2d 782 (Fla. Dist. Ct. App. 2002) 10

Doran v. Salem Inn, Inc., 422 U.S 922 (1975) 17, 18, 22

Green v. City of Tuscon,
255 F.3d 1086 (9th Cir. 2001) (*en banc*) 24

Henry & Rilla White Found., Inc. v. Migdal,
720 So. 2d 568 (Fla. Dist. Ct. App. 1998)..... 9

Hicks v. Miranda, 422 U.S. 332 (1975) 18

Huffman v. Pursue, Ltd., 420 U.S. 592 (1975)..... 16, 18

In re R. V.,
626 So. 2d 1009 (Fla. Dist. Ct. App. 1993)..... 9

J. B. ex rel. Hart v. Valdez,
186 F.3d 1280 (10th Cir. 1999).....24-27

Joseph A. ex rel. Wolfe v. Ingram,
275 F.3d 1253 (10th Cir. 2002).....25-27

Judice v. Vail, 430 U.S. 327 (1977) 17, 19

Kaisner v. Kolb, 543 So. 2d 732 (Fla. 1998)..... 9

Klein v. Berk Constr. Co, 260 U.S. 226 (1922)..... 15

Kugler v. Helfant, 421 U.S. 117 (1975) 18

L. H. v. Jamieson, 643 F.2d 1351 (9th Cir. 1981)..... 27, 28

Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993) 2

Lee v. Dep't Health and Rehab. Servs.,
698 So. 2d 1194 (Fla. 1997) 8, 9

Marks v. Stinson, 19 F.3d 873 (3d Cir. 1994) 24

Middlesex County Essex Comm. v. Garden State Bar Ass'n,
457 U.S. 423 (1982) 13, 16, 19

Missouri Child Care Ass'n v. Cross.,
294 F. 3d 1034 (8th Cir. 2002) 21

Moore v. Sims, 442 U.S. 415 (1979) 19

New Orleans Pub. Serv., Inc, v. Council of City of New Orleans, 491 U.S. 350 (1989) ..... *passim*

Ohio Civil Rights Comm'n v. Dayton Christian Schs. Inc.,
477 U.S 619 (1986) 19

O'Shea v. Littleton, 414 U.S. 488 (1974) 18, 20, 21

P. O. v. Dep't of Children and Families,
840 So. 2d 360 (Fla. Dist. Ct. App. 2003) 6

Pennzoil Co. v. Texaco, Inc., 481 U. S. 1 (1987) 17, 19

Perez v. Ledesma, 401 U.S. 82 (1971) 18

Pompey v. Broward County,
95 F. 3d 1543 (11th Cir. 1996) 2

Samuels v. Mackell, 401 U.S. 66 (1971) 16, 18

Trainor v. Hernandez,431 U.S. 434 (1977) 17, 18

Youngberg v. Romeo, 457 U.S. 307 (1982)..... 22

Younger v. Harris, 401 U.S. 37 (1971) 3, 16, 18

Will v. Michigan Dep't of State Police,
491 U.S. 58 (1989) 21

CONSTITUTION, STATUTES AND REGULATIONS:

U.S. Const., Amend. I 2

U.S. Const., Amend. IX..... 2

U.S. Const., Amend. XIV 2

28 U.S.C. § 1343(b) (2003) 2

42 U.S.C. § 675(5) (2003)..... 8

42 U.S.C. § 1983 (2003) 2, 11

Fed. R. Civ. P. 17(c)..... 7

Fla. Stat. § 39.402 (2003)..... 6

Fla. Stat. § 39.402(1)(a) (2003) 7

Fla. Stat. § 39.507 (2003) 7

Fla. Stat. § 39.521(3)(d) (2003) 7

Fla. Stat. § 39.601 (2003) 8

Fla. Stat. § 39.601(1)(c) (2003) 6

Fla. Stat. § 39.603(2) (2003) 8

Fla. Stat. § 39.701 (2003) 8

Fla. Stat. § 39.701(1)(b) (2003) 8

Fla. Stat. § 39.703 (2003) 8

Fla. Stat. § 39.811(8) (2003) 7

Fla. Stat. § 39.802 (2003) 7

Fla. Stat. § 402.72 (2003) 6

Fla. Stat. § 402.731(1)-(2) (2003) 6

Fla. Stat. § 409.145 (2003) 5, 6

Fla. Stat. § 401.145(3) (2003) 6

Fla. Stat. § 409.175 (2003) 6

Fla. Admin. Code §§ 65C-13.009-11 (2003) 6

PETITION FOR A WRIT OF CERTIORARI

Petitioners, on behalf of themselves and a putative class of Florida foster children, respectfully petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit, to review that court's judgment and opinion affirming the decision of the District Court for the Southern District of Florida to abstain from adjudicating petitioners' constitutional claims.

OPINIONS BELOW

The opinion of the Eleventh Circuit affirming the district court's decision to abstain (App. 1a-44a) is reported at 329 F.3d 1255. The per curiam order of the court of appeals denying the petition for rehearing (App. 95a-96a) is unreported. The order and opinion of the district court (App. 45a-94a) is reported at 180 F. Supp. 2d 1321, and the underlying report and recommendation of the magistrate judge that the district court not abstain from hearing petitioners' claims is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 2003. Rehearing was denied on June 13, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in the appendix to this petition are the First, Ninth and Fourteenth Amendments to the United States Constitution; 42 U.S.C. § 1983 and 28 U.S.C. § 1343(b); and pertinent provisions of the Florida Constitution and Florida Statutes (App. 101a-123a).

STATEMENT OF THE CASE

A. Introduction.

Petitioners are foster children who have been removed from their homes and placed into the custody of the state and who are, as a result, wholly dependent on the government for all aspects of their health and well-being. Petitioners allege that respondents, their legal custodians, have failed to satisfy their constitutional obligations to protect petitioners from harm while in state custody and to meet their basic needs for food, clothing, shelter, medical, educational and other necessary services.[1] As alleged by petitioners, respondents operate a deficient foster care system that gravely harms the very children it is supposed to protect. Specifically:

- Respondents have failed to recruit and develop sufficient foster and adoptive placements, resulting in overcrowding and inherently dangerous living

[1] For purposes of this petition, the facts asserted in petitioners' amended complaint are to be deemed true. *See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 165 (1993); *Pompey v. Broward County*, 95 F.3d 1543, 1548 n.6 (11th Cir. 1996).

environments for children (*see* Am. Compl. ¶¶ 142-44, 151-53);

- Respondents have failed to hire and properly train sufficient caseworkers, the result being that foster children are inadequately supervised and are kept in crowded and unsafe homes and institutions (*id.* ¶¶ 146-148);

- Respondents unnecessarily move foster children from placement to placement and separate them from their siblings who are also in foster care custody, resulting in emotional and psychological deterioration to the children (*id.* ¶¶ 157-60); and

- Respondents deny basic services to foster children in their custody, even after determinations of need made by the Department itself (*id.* ¶¶ 164-67).

The result is a statewide system that, rather than protecting damaged children, inflicts further harm on them. Petitioners seek prospective injunctive and declaratory relief requiring respondents to remedy these and other systemic failures. To date, however, petitioners have been barred from pursuing their federal claims in their chosen federal court forum by virtue of the district court's and the Eleventh Circuit's unprecedented expansion of the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971).

The lower court, affirmed by the Eleventh Circuit, granted respondents' motion to dismiss based on *Younger* abstention, holding that the prospective equitable relief sought

by petitioners against the solely executive branch respondents would "interfere" with the Florida juvenile court's periodic reviews of petitioners' status while in foster care. This Court, however, has always strictly limited application of *Younger* abstention to cases in which the requested relief, if granted, would enjoin or otherwise limit the state proceedings themselves – circumstances not at all present in this case. The mere fact that there may be some overlap between the subject matters encompassed by the federal and state proceedings is not, as has seemingly been determined here by the Eleventh Circuit, the standard by which a federal court should decline jurisdiction lawfully conferred upon it by Congress. The ruling of the Eleventh Circuit conflicts, at least in principle, with this Court's prior abstention rulings and heralds a pronounced expansion of *Younger* that categorically bars foster children – who have periodic state judicial review proceedings by virtue of their custodial status – from pursuing their federal claims against executive branch officials in federal court. Respectfully, a grant of certiorari is warranted to review and correct the Eleventh Circuit's ill-advised extension of *Younger* abstention.

As an independent ground warranting review, the court of appeals' decision is in conflict with other circuit court determinations concerning the *Younger* "interference" standard, and there is, moreover, a direct conflict in the circuit courts on the application of *Younger* abstention to foster care reform litigation of the type at issue here.

B. The State's Foster Care System.

The executive branch officials in the Department, on the one hand, and the juvenile courts, on the other, both play

important, though fundamentally distinct, roles in the protection of Florida's abandoned, abused and neglected children. It is only the practices and inactions of the Department, not the procedures or determinations of the juvenile courts, that are challenged in this action.

The Department's central obligations with respect to the children in its care are set forth in Chapter 409 of the Florida Statutes,[2] which provides that

> The [D]epartment shall conduct, supervise, and administer a program for dependent children and their families. The services of the [D]epartment are to be directed toward the following goals: (a) The prevention of separation of children from families. (b) The reunification of families who have had children placed in foster homes or institutions. (c) The permanent placement of children who cannot be reunited with their families or when reunification would not be in the best interest of the child. (d) The protection of dependent children or children alleged to be dependent, including provision of emergency and long-term alternate living arrangements.

Fla. Stat. § 409.145 (2003). The Department is exclusively

---

[2] Foster care is provided through a system of cooperative federalism, in which the federal government grants substantial funds to states to provide out-of-home foster care and related services that comport with federal standards and requirements. The state, however, creates the foster care system's structure, including the obligations of and limitations on the powers and duties of the Department and of the juvenile court.

empowered to recruit, select, set standards for, and monitor homes and facilities providing care to foster children in their charge. *See* Fla. Stat. § 409.175 (2003); Fla. Admin. Code §§ 65C-13.009-11 (2003). The Department manages the services provided to foster children by private contractors through performance standards and penalties for non-compliance. Fla. Stat. § 402.72 (2003). And the Department alone is responsible for ensuring that the workforce it employs is appropriate to the task of caring for foster children, including through its certification that the Department's workers meet all appropriate education, experience and training requirements. Fla. Stat. § 402.731(1)-(2) (2003).[3] In sum, the Department constructs and operates the foster care system.

The juvenile court exercises its own judicial responsibilities over children in state custody. The powers and limitations of this state court vis-a-vis foster children are set out in Chapter 39 of the Florida Statutes. Though the juvenile court is to "cooperate" with the Department in carrying out the purposes of Chapter 409 (Fla. Stat. § 409.145(3) (2003)), no statute or other authority gives the Florida courts jurisdiction to directly regulate the Department's operation of the foster care system.

The juvenile court's role begins when the child is taken into governmental custody by the Department or by law enforcement. Fla. Stat. § 39.402, § 409.145 (2003). Once the

---

[3] The Department is also charged with regularly monitoring every foster child's placement, including through face-to-face visits with the child. *See* Fla. Stat. § 39.601(1)(c) (2003); *P.O. v. Dep't of Children and Families*, 840 So. 2d 360, 362 (Fla. Dist. Ct. App. 2003) (failure to provide for face-to-face contacts in child's case plan was in derogation of "statutorily mandated duties").

Department files a petition against parents or other legal guardians alleging a child to be dependent, *i.e.*, abandoned, abused or neglected (*see* Fla. Stat. § 39.402(1)(a) (2003)), the juvenile court's jurisdiction is to conduct the necessary proceedings and to either adjudicate the child as dependent or to dismiss the case and return the child to the parents. Fla. Stat. § 39.507 (2003). If the court adjudicates the child dependent and determines that the child cannot be safely placed with the child's parents or the home of a relative or other suitable "nonlicensed" placement, then the child is committed to the "temporary legal custody" of the Department, a commitment that "invests in the [D]epartment all rights and responsibilities of a legal custodian." Fla. Stat. § 39.521(3)(d) (2003).

The custodial adjudications made in these initial proceedings are not in any respect the subject of petitioners' federal claims, nor are petitioners' parents (or other legal guardians prior to removal) parties to this case.[4] Petitioners do not contend for instance that they were improperly removed from their parents and placed into state custody, nor do they allege that their parents were improperly denied pre-custodial services that might have prevented their entry into state custody. Petitioners challenge instead the deficient conditions of custody they are subjected to by the Department's policies and practices *after* these custody adjudications have been made by the juvenile court.[5]

---

[4] Petitioners' interests in this lawsuit are represented by adult "next friends." *See* Fed. R. Civ. P. 17(c).

[5] The juvenile court may eventually be called upon to conduct a termination of parental rights proceeding in connection with a child's case, but only if the Department (or other party) files a petition seeking such relief. Fla. Stat. §§ 39.701, 39.703, 39.802 (2003). As with the juvenile court's custody decisions, petitioners do not seek to challenge any decisions of the juvenile

From the time a child enters state custody until the child is returned home without supervision, adopted or reaches 18 years of age, the juvenile court is charged with periodically reviewing the child's status, usually not more than once every six months. Fla. Stat. §§ 39.701(1)(b), 39.811(8) (2003).[6] Prior to all juvenile court review proceedings, the Department develops and submits to the court a case plan which details, among other things, information about the child's placement; the behavioral changes the child's parents must make to regain custody of the child; the frequency of parent-caseworker contacts; the "permanency" goal for the placement; and the services to be provided to the child and the child's family to achieve the goal. Fla. Stat. § 39.601 (2003). The plan serves as the principal vehicle through which the juvenile court performs its reviews of the child's status and the efforts being made on his or her behalf by, among others, the Department.

The court must approve this case plan but does not have the authority to change the document. If the court disapproves of the plan, it can only order the parties to make modifications and resubmit the plan for approval. Fla. Stat. § 39.603(2) (2003). Though the juvenile court may in certain limited circumstance hold the Department in contempt for failing to comply with the case plan, it cannot oversee discretionary executive functions of the Department, including (i) specific placement decisions, *Dep't Health & Rehab. Servs. v. B.J.M.*, 656 So. 2d 906, 913 (Fla. 1995); (ii) decisions regarding staff caseloads and staffing patterns, *Lee v. Dep't Health & Rehab. Servs.*, 698 So. 2d 1194, 1196 (Fla. 1997); (iii) the

---

courts relating to termination of parental rights.

[6] The state is also required to assure at least yearly court or administrative reviews as a condition of federal funding. *See* 42 U.S.C. § 675(5)(2003).

Department's maintenance of adequate foster care service arrays to meet the needs of children, *id.*; and (iv) general conditions at facilities housing children, *Dep't of Children & Family Servs. v. I.C.*, 742 So. 2d 401, 405 (Fla. Dist. Ct. App. 1999); *Henry & Rilla White Found., Inc. v. Migdal*, 720 So. 2d 568, 573 (Fla. Dist. Ct. App. 1998). Even in cases where the safety of a child is at issue, the juvenile courts have the authority to enter only specific and limited types of relief[7] and cannot direct child welfare authorities in their systemic policymaking, planning, and prioritization decisions. *See I.C.*, 742 So. 2d at 404.[8]

C. Petitioners' Federal Claims and Relief Sought.

Petitioners assert that respondents are violating their substantive due process rights by instituting and engaging in a pattern and practice of failing to provide them with safe foster care, placements, and necessary services and by failing to meet

---

[7] In juvenile court proceedings, the Department's assertion of inadequate state appropriations is a defense to any contempt order the court may seek to levy against the Department for non-compliance with a case plan. *See Dep't of Children & Families v. J.H.*, 831 So. 2d 782, 783 (Fla. Dist. Ct. App. 2002) (reversing juvenile court order requiring the Department to fund treatment of a child because the order "ignores [the Department's] funding issues"); *In re R.V.*, 626 So. 2d 1009, 1009 (Fla. Dist. Ct. App. 1993) ("the state judiciary lacks subject matter jurisdiction to review discretionary acts of the executive branch affecting the use of state resources").

[8] Florida's notably robust separation of powers doctrine places off-limits to judicial oversight, including that of the juvenile courts, discretionary executive functions involving decision-making on fundamental questions of policy or planning. *Kaisner v. Kolb*, 543 So. 2d 732, 736-37 (Fla. 1998) (interpreting related doctrine of executive sovereign immunity from tort liability); *I.C.*, 742 So. 2d at 404 (precluding juvenile courts from ordering or regulating discretionary function of executive authority).

their basic needs, all of which has significantly harmed petitioners (Am. Compl. ¶¶ 139-90). Petitioners further claim violations of their procedural due process rights by respondents' failure to establish processes for an administrative hearing or professional review of decisions that deny petitioners benefits to which they are entitled (*id.* ¶¶ 191-201). Finally, petitioners seek redress for respondents' violation of petitioners' First and Ninth Amendment rights to familial association by unnecessarily separating them from, and denying visitation with, their siblings in state custody (*id.* ¶¶ 202-04).[9]

Petitioners seek, on behalf of themselves and the putative class of children in state foster care custody: (1) a declaration that respondents' failures are constitutional violations; (2) an injunction permanently enjoining respondents from subjecting petitioners and the putative class members to foster care practices that violate their constitutional rights; (3) an order of appropriate remedial relief to ensure respondents' future compliance with the Constitution of the United States and their provision of legally mandated services, protection and procedures to petitioners and the putative class members; (4) the appointment of an expert panel to "develop and oversee the implementation of a plan for reform, which will ensure that [respondents] protect the federal constitutional . . . rights of [petitioners] and the members of the class they seek to represent"; and (5) the appointment of a permanent ombudsman

---

[9] The only claims germane to this appeal are petitioners' constitutional claims. Petitioners' statutory claims under the Adoption Assistance and Child Welfare Act, as amended by the Adoption and Safe Families Act; the Early, Periodic Screening, Diagnosis and Treatment provisions of the Medicaid Title of the Social Security Act (the "EPSDT claims"); and Title VI of the 1964 Civil Rights Act were dismissed or settled on grounds not relevant to this petition.

or children's advocate to present the interests of petitioners and the putative class members to respondents (App. 98a-100a).[10]

D. Proceedings Below.

Petitioners brought suit pursuant to 42 U.S.C. § 1983 in the United States District Court for the Southern District of Florida in June 2000, filed their amended class action complaint in August 2000, and moved in September 2000 to certify the statewide class of all alleged or adjudicated dependent children who were or would in the future be in the Department's custody and a subclass of all alleged or adjudicated dependent black children.[11] Respondents filed various motions to dismiss the amended complaint, a number of which were referred to a magistrate judge, along with petitioners' class certification motion. The magistrate judge entered his report and recommendation that the motions to dismiss be denied (except with regard to four of the named plaintiffs who did not have standing to assert claims under the Adoption and Safe Families Act (the "ASFA claims") because their parental rights had been terminated). The magistrate judge additionally entered a report and recommendation that a class should be certified, consisting

---

[10] For the convenience of the Court, the "Prayer for Relief" from petitioners' amended complaint is excerpted in Appendix D (App. 98a-100a).

[11] Before responding to either the amended complaint or class certification motion, respondents moved in the district court to require counsel to produce documentation establishing their authority to represent petitioners and to stay the case. The district court denied the motion in an order appointing a guardian ad litem to report on whether prosecution of this action was in petitioners' best interests. On December 15, 2000, the guardian ad litem issued a report concluding that the failures in Florida's foster care system had caused petitioners "real harm" and the prosecution of the lawsuit to a final resolution was in the best interests of petitioners and the class they sought to represent.

of all Florida foster children except those in Broward County who were parties to a separate federal class action lawsuit.

Following respondents' objections to the reports and recommendations, on December 14, 2001, the district court entered an order dismissing with prejudice the constitutional claims of the plaintiffs who were less than 18 years of age (and therefore had pending juvenile court proceedings) based on the *Younger* abstention doctrine (App. 45a-94a).[12] The district court did not rule on the class certification motion that the magistrate judge had recommended be granted.

Petitioners filed their notice of appeal to the Eleventh Circuit on December 31, 2001. The Eleventh Circuit affirmed the district court's rulings by Opinion and Order dated May 8, 2003 (App. 1a-44a).[13] Applying an abuse of discretion standard, the court affirmed the district court's decision not to exercise jurisdiction and to abstain from adjudicating petitioners' constitutional claims based on *Younger* abstention.

---

[12] The court also (i) dismissed with prejudice plaintiffs' ASFA claims as barred by the Eleventh Amendment, and (ii) dismissed with leave to replead the EPSDT and Title VI claims which respondents and the pertinent petitioners settled in February 2002.

[13] The Eleventh Circuit first considered a number of justiciability concerns raised by respondents and concluded that, although the claims of two of the eleven petitioners seeking review were moot by virtue of these children having been adopted (and thus having left state custody), the other nine petitioners had standing to pursue their claims. The Eleventh Circuit did not reach the application of the Eleventh Amendment to these proceedings, dismissing petitioners' ASFA claims instead on the grounds that the statutory provisions upon which the claims were predicated did not provide a basis for private enforcement (App. 6a-28a).

In reaching its abstention ruling, the court of appeals applied the three-part test set forth by this Court in *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). Without explanation or citation to the record, the Court erroneously determined that the first *Middlesex* prong, which the court acknowledged requires not just an ongoing state proceeding but "interference" with such proceeding, was met because the relief sought by plaintiffs would "plac[e] decisions that are now in the hands of the state courts under the direction of the federal district court" (App. 37a). The court found further that the "federal and state courts could well differ, issuing conflicting orders about what is best for a particular plaintiff . . ." (App. 37a). The court of appeals also cited as grounds for abstention the potential for federal court relief that "might effectively require an amendment to a child's case plan that the state court would not have approved . . ." (App. 37a). Finally, the court appeared to rely in part on a misreading of the amended complaint in reaching its abstention ruling, finding that the mission of a group of experts that petitioners sought to have the district court empanel to guide and advise *respondents* in a reform effort (*see* App. 99a) was instead sought to "revamp and reform dependency proceedings in Florida" (App. 37a-38a).

The Eleventh Circuit also found that the third prong of the *Middlesex* test – the ability to raise constitutional claims in the ongoing state proceeding – was satisfied, determining that petitioners had not presented "unambiguous authority establishing that the procedures available in state court proceedings do not provide an adequate opportunity for [petitioners] to raise their constitutional claims" (App. 41a-42a), a determination petitioners intend to challenge should this petition be granted, but which is not directly relevant to the

Court's consideration of the need for review.[14]

By petition dated May 28, 2003, petitioners sought panel rehearing of the Eleventh Circuit's abstention ruling, principally based on the court's misstatement of the nature of the relief petitioners sought. By summary per curiam order dated June 13, 2003, the panel denied the petition for rehearing (App. 95a-96a).

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's decision represents a dramatic and unsound expansion of *Younger* abstention that raises important issues about the interaction of the nation's dual system of federal and state courts. The decision turns a narrowly-drawn exception to a federal court's "virtually unflagging" duty to exercise its jurisdiction into a categorical bar to foster children in state custody seeking to enjoin prospective violations of their constitutional rights by the executive officials responsible for their care. The decision conflicts in principle with three decades of this Court's teachings on the type of federal court interference with state court proceedings that calls for application of *Younger* abstention. The decision also conflicts directly with decisions of other circuit courts applying the *Younger* abstention "interference" standard, including those concerning application of *Younger* to factually similar child welfare reform litigation. Respectfully, certiorari should be granted to correct the Eleventh Circuit's expansion of the *Younger* doctrine far beyond the federalism principles that justify it and to resolve the

---

[14] As noted by the court, the second *Middlesex* prong – the implication of important state interests by the action – is not in dispute.

circuit conflicts on the important jurisdictional issues raised in this case.

1. The Writ Should Be Granted to Correct the Eleventh Circuit's Extension of *Younger* Abstention Beyond This Court's Prior Limitations.

The Eleventh Circuit's decision deviates far from all prior precedents of this Court and the sound reasoning embodied in them, distorting the threshold *Younger* abstention requirement of "interference" with ongoing state court proceedings into an empty formalism. Correction of the judicial "under-reaching" implicit in the Eleventh Circuit's decision is warranted to preserve the federalism and comity principles served by *Younger* abstention and to confine the doctrine to appropriate bounds.

Within constitutional limits, Congress has the exclusive authority to define the jurisdiction of the federal judiciary and "federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 359 (1989)("*NOPSI*"); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922); *Cohens v. Virginia*, 19 U.S. 264, 404 (1821) (Marshall, C.J.) ("[T]o decline the exercise of jurisdiction [or] usurp that which is not given. . . . would be treason to the constitution"). While a federal court's obligation to exercise its jurisdiction does not "eliminate [its] discretion in determining whether to grant certain types of relief" insofar as such discretion "was part of the common-law background against which the statutes conferring jurisdiction were enacted," *NOPSI*, 491 U.S. at 359 (citing David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 570-77 (1985)), this

Court has repeatedly cautioned that the areas in which abstention is permissible are "carefully defined," *id.*, and abstention is an "'extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.'" *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976) (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959)).

Younger abstention governs one such "carefully defined" class of cases in which authorized equitable relief may be withheld: those in which a grant of the requested federal injunctive or declaratory relief would interfere with ongoing state court proceedings, implicating important state interests, and in which the federal plaintiffs would have an adequate opportunity to vindicate their federal claims. *See NOPSI*, 491 U.S. at 372-373; *Middlesex*, 457 U.S. at 432. In *Younger v. Harris* itself, the Court, citing equitable restraint and comity concerns, rejected an order from a federal court that restrained a state prosecutor from proceeding with an ongoing state criminal prosecution of the federal court plaintiff. 401 U.S. 37, 53-54 (1971). On the same day as it determined *Younger*, the Court determined that a federal court may withhold declaratory relief under the same reasoning as that set forth in *Younger* where the declaratory relief at issue would have the same "practical effect" as enjoining a pending state criminal prosecution. *Samuels v. Mackell*, 401 U.S. 66, 73 (1971). In the years since *Younger* and *Samuels* were decided, the Court has clarified that, in addition to criminal prosecutions, *Younger* abstention may be appropriate where the federal relief sought interferes with civil enforcement proceedings "akin to a criminal prosecution," *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975) (civil

nuisance proceedings),[15] and even to "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions," *NOPSI*, 491 U.S. at 368, such as orders relating to the enforcement of judgments and contempt proceedings.[16] This Court has always maintained, however that there be unequivocal interference with state court proceedings for *Younger* abstention to apply.

Importantly, *Younger* abstention does not permit federal courts to decline to exercise lawfully conferred jurisdiction over cases merely because parallel federal and state court proceedings address overlapping, or even the same, subject matters. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 928 (1975) ("the interest of avoiding conflicting outcomes in the litigation of similar issues, while entitled to substantial deference in a unitary system, must of necessity be subordinated to the claims of federalism"). It is not enough that a federal court's disposition of a case "may well affect, or for practical purposes, pre-empt, a future . . . [or] even pending [] state court action. . . . there is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts." *NOPSI*, 491 U.S. at 372.

Rather, what is required to trigger the *Younger* exception is a request for injunctive or declaratory relief that would result in the federal court exercising control over a state judicial proceeding or over the state courts themselves. Thus,

---

[15] *See also Trainor v. Hernandez*, 431 U.S. 434 (1977) (civil proceedings seeking attachment and return of funds allegedly obtained by welfare fraud).

[16] *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987) (civil judgment enforcement proceedings); *Judice v. Vail*, 430 U.S. 327 (1977) (contempt proceedings relating to post-judgment enforcement subpoenas).

every case in which this Court has applied *Younger* has involved remedies that would have the effect of putting a halt to state court proceedings. The means by which this federal control over the state court action is exercised has varied. In the most common scenario – present in eleven of this Court's fifteen affirmative *Younger* abstention cases – the federal plaintiff seeks to directly enjoin (and in almost all of these cases, does in fact obtain an injunction of) state court judges, prosecutors, law enforcement officers and even court clerks from continuing with the prosecution of state court proceedings they are charged with conducting, often at the same time launching a facial attack on the constitutionality of the statute underlying the proceedings.[17] In the remaining four cases, the offending relief targets administrative bodies, executive agency officials, and even private litigants, but in each instance the federal plaintiff seeks to enjoin the state proceedings

---

[17] *Trainor*, 431 U.S. at 438 (enjoining clerks and sheriffs from issuing or serving attachments); *Judice*, 430 U.S. at 328 (enjoining state court judges from enforcement of contempt proceedings); *Doran*, 422 U.S. at 924 (granting injunction of town attorney and other law enforcement officials); *Hicks v. Miranda*, 422 U.S. 332, 340 (1975) (enjoining district attorneys and law enforcement personnel and declaring the unconstitutionality of obscenity statute in criminal proceeding); *Kugler v. Helfant*, 421 U.S. 117, 119 (1975) (enjoining attorney general from proceeding with criminal prosecution); *Huffman*, 420 U.S. at 599 (enjoining sheriff and prosecuting attorney and execution of judgment); *O'Shea v. Littleton*, 414 U.S. 488 (1974) (seeking to enjoin state court judges and law enforcement officials from taking certain actions in future criminal prosecutions); *Perez v. Ledesma*, 401 U.S. 82 (1971) (entering suppression order requiring return by law enforcement officials of materials); *Boyle v. Landry*, 401 U.S. 77, 78 (1971) (enjoining state court judges and state's attorney from prosecution of intimidation statutes); *Samuels*, 401 U.S. at 73 (1971) (seeking to enjoin district attorney from proceeding with criminal case and to declare statue underlying prosecution unconstitutional); *Younger*, 401 U.S. at 53-54 (enjoining district attorney from proceeding with criminal case).

themselves or to enjoin a litigant from instituting or continuing with such proceedings.[18]

Petitioners here seek no relief even remotely akin to that which has justified *Younger* abstention in prior decisions of this Court. To the contrary, this is a generic civil rights action brought to compel an administrative agency to comply with federal law in its institutional exercise of control over petitioners and the putative class they seek to represent. The prayer for relief in petitioners' amended complaint calls for general declaratory and injunctive relief directed solely at the Department, not Florida's juvenile courts, juvenile court judges or juvenile court personnel (App. 97a-100a). Petitioners do not seek to enjoin, or to have the federal court in any respect exercise control over, their ongoing state juvenile court proceedings, which will continue without interference regardless of the outcome of this suit. Nor do petitioners seek to challenge the constitutionality of any state statute, contest any juvenile court custodial or parental rights determination, or compel or restrain the Department from instituting or maintaining proceedings in juvenile court on behalf of, or against, any party. *Compare with Moore v. Sims*, 442 U.S. 415, 417 (1979) (state court proceedings enjoined by district court pursuant to "broad facial attack" in federal court on constitutionality of Texas Family Code brought by parents and minor children challenging children's removal from parents'

---

[18] *See Pennzoil*, 481 U.S. at 8 (enjoining attempts to enforce state court judgment or obtain lien under state law); *Ohio Civil Rights Comm'n v. Dayton Christian Schs. Inc.*, 477 U.S. 619, 625 (1986) (enjoining civil rights commission from exercising jurisdiction over sex discrimination claim); *Middlesex*, 457 U.S. at 426 (seeking to enjoin state attorney disciplinary proceeding); *Moore v. Sims*, 442 U.S. 415, 422 (1979) (enjoining juvenile court neglect and abuse proceedings).

home into state custody).

Notwithstanding the plain language of the amended complaint limiting the relief sought to executive conduct, the Eleventh Circuit erroneously determined that petitioners seek federal court control over petitioners' juvenile court proceedings and even the juvenile courts themselves. Most dramatically, the court found that plaintiffs seek implementation of a "systemwide plan to revamp and reform dependency proceedings in Florida, as well as the appointment of a permanent children's advocate to oversee that plan," a clear factual error (*see* p. 13, *supra*). In addition, however, the Eleventh Circuit found "interference" in (i) its conclusory statement that the relief sought by petitioners would place decisions "now in the hands of the state courts under the direction of the federal district court"; and (ii) the unarticulated potential for "conflicting orders about what is best for a particular plaintiff," resulting in "amendment[s] to a child's case plan that the state court would not have approved." (App. 37a). These concerns are misplaced and the Eleventh Circuit's reliance on them is flatly inconsistent with this Court's prior teachings.

The Eleventh Circuit cites in support this Court's decision in *O'Shea v. Littleton* for the proposition that "[t]he relief sought need not directly interfere with an ongoing proceeding or terminate an ongoing proceeding in order for *Younger* abstention to be required." (App. 32a.) But *O'Shea* establishes only that the targets of ongoing state enforcement hearings cannot evade the *Younger* bar by simply framing their claim as one for prospective relief. *Younger* bars not only remedies that cause the federal courts to usurp present state court hearings but also prospective relief that would inevitably

lead to a similar result. Notably, Michael O'Shea and his co-petitioner were state court judges, and the injunction at issue contemplated "interruption of state proceedings to adjudicate assertions of noncompliance by petitioners" which to the Court constituted "nothing less than an ongoing federal audit of state criminal proceedings." *O'Shea*, 414 U.S. 488, 500 (1974). Such relief, which directly targeted judicial officers and the criminal proceedings they oversee, even if only prospectively, is a far cry from the exclusively executive branch-focused remedial relief sought in this case.

Rather than relief targeting judicial decisions about what is best for an individual child before the juvenile court or amendments to a particular child's custodial disposition or case plan, petitioners – representing a putative class of nearly all Florida's foster children – seek such systemic changes as the employment of more and better trained caseworkers, the recruitment of more and a wider availability of appropriate and safe foster placements, and better state oversight and control over the agencies with which the state contracts to provide foster care services. This is precisely the relief that the Florida separation of powers doctrine and other procedural, substantive and practical barriers preclude Florida's foster children from obtaining in juvenile court (*see* pp. 8-9, *supra*).[19] As a result,

[19] Unlike the juvenile court, federal district courts are not constrained from granting relief that might require additional state expenditures. *Will v. Michigan Dep't of State Police et al.*, 491 U.S. 58, 90 (1989) (equitable relief "may be awarded to ensure future compliance by a State with a substantive federal question determination" even if such compliance requires expending state funds); *Missouri Child Care Ass'n v. Cross*, 294 F.3d 1034, 1042 (8th Cir. 2002) (citing *Milliken v. Bradley*, 433 U.S. 267, 289 (1977); *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974); *Wyatt v. Aderholt*, 503 F.2d 1305, 1315 (5th Cir. 1974); *Anticran v. Odom*, 290 F.3d 178, 186 (4th Cir. 2002)).

there is no likelihood of even indirect interference with, or intrusion into, the state court's proceedings, which will continue regardless of petitioners' ability to pursue federal judicial relief.[20]

Moreover, petitioners seek only injunctive and declaratory relief addressed to the actions and inactions of the Department as an *executive* authority – specifically, the Department's implementation and operation of a child welfare system that comports with reasonable professional standards. *See Youngberg v. Romeo*, 457 U.S. 307, 324 (1982). Such conduct is separate and distinct from any individualized *judicial* review of executive action in the context of an individual foster child's dependency review proceedings. As this Court noted in *NOPSI*, where *Younger* abstention was held not to foreclose a federal court challenge to a state legislative body's rate-setting determination subject to parallel state court review:

> [I]t has never been suggested that *Younger* requires abstention in deference to a state judicial proceeding reviewing legislative or executive action. Such a broad abstention requirement would make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States.

---

[20] Not only is the prospect of inconsistent orders chimerical given the nature of the systemic relief sought by petitioners, the mere fact that there is a potential for disagreement in the outcomes of the federal and state judicial proceedings is not by itself a proper basis, under this Court's decisional law, for application of the *Younger* bar. *See NOPSI*, 491 U.S. at 372; *Doran*, 422 U.S. at 928.

NOPSI, 491 U.S. at 368 (citations omitted). Thus, by virtue of both (i) the wholly divergent relief sought and available in the parallel federal and state proceedings at issue and (ii) the executive nature of the conduct challenged, this case is – like the federal challenge to the council's rate-making determination in *NOPSI* – simply beyond the purview of the *Younger* abstention doctrine.

The Eleventh Circuit has adopted such a broad abstention doctrine that the danger identified in *NOPSI* – the exception that would swallow the rule that *Younger* abstention be only a limited exception to a federal court exercising its lawfully-conferred jurisdiction – has come to pass. Some of the nation's most vulnerable citizens, abused and neglected children in state foster care custody, have been prohibited from challenging in federal court the unconstitutional conditions of their confinement by government custodians and from obtaining appropriate relief. Respectfully, the Court should grant review to correct this harmful expansion of what federalism dictates must remain a doctrine only sparingly applied.

2. The Writ Should Be Granted to Resolve Splits Among the Circuit Courts.

The Court's voice is needed to resolve conflicts between the circuits on the type of "interference" with state court proceedings justifying application of *Younger*, including direct conflicts on *Younger* abstention in the context of foster care reform litigation.

a. Though petitioners believe the corpus of

Supreme Court *Younger* abstention case law is consistent in requiring "interference" with ongoing state court proceeding that results in the injunction or other non-collateral limitation of those proceedings, the circuits abound with conflicts on this issue. The decisions reflect three strains:

i. *Direct interference with state court proceedings required* – The *en banc* Ninth Circuit in *Green v. City of Tuscon*, determined emphatically that federal relief qualifying for *Younger* must "directly interfere" with the ongoing state court proceedings and the doctrine is not satisfied merely by the possibility of inconsistent outcomes in parallel proceedings. 255 F.3d 1086, 1097 (9th Cir. 2001) (*en banc*). Rather, the interference of *Younger* is that which seeks to "enjoin, declare invalid, or otherwise involve the federal courts in terminating or truncating the state court proceedings." *Id.* at 1098. *See also Marks v. Stinson*, 19 F.3d 873, 885 (3d Cir. 1994) ("since parallel proceedings always involve a likelihood that a final merits judgment in one will effectively terminate the other, it necessarily follows that the mere fact that a judgment in the federal suit might have collateral effects in the state proceeding is not interference for *Younger* purposes"); *Crawley v. Hamilton County Com'rs*, 744 F.2d 28, 30 (6th Cir. 1984) (declining to abstain where "the federal plaintiffs . . . are not attempting to use the federal courts to shield them from state court enforcement efforts").

ii. *At least indirect interference with state court proceedings required* – In *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280 (10th Cir. 1999), a suit brought on behalf of a putative class of developmentally disabled children in the custody of New Mexico, the district court denied class certification and thereafter dismissed the individual named plaintiffs' lawsuits on

abstention grounds. *Id.* at 1283. The Tenth Circuit affirmed the denial of class certification (*id.*), dismissed a number of the individual named plaintiffs' claims as moot (*id.* at 1290), and upheld the district court's decision to abstain as to the three individual plaintiff children remaining in the case (*id.* at 1293). The court determined that federal court consideration of three children's individual claims was likely to interfere with the children's ongoing proceedings because the only remaining claims required specific changes in the plaintiffs' case plans (*id.* at 1295) which would "place[] the federal court in the role of making dispositional decisions such as whether to return the child to his parents in conjunction with state assistance or whether to modify a treatment plan." *Id.* at 1291-92.

Further along the spectrum is the Tenth Circuit's decision in *Joseph A. ex rel. Wolfe v. Ingram*, 275 F.3d 1253 (10th Cir. 2002), and the extension of the *Younger* doctrine contemplated in it. The plaintiffs in *Joseph A.*, a class of foster children, sued the New Mexico Department of Human Services for failure to provide meaningful access to foster care and adoption services. The case was settled with the parties entering into a federal court consent decree. *Id.* at 1256. In the context of a contempt proceeding brought by plaintiffs based on defendants' failure to comply with the terms of a court-ordered "exit plan" from the original decree, the Tenth Circuit articulated a novel expansion of the *Younger* doctrine under which abstention may be warranted if a federal decree or injunction "requires interference with the operations of [state court proceedings] in an insidious way in that the [decree] expressly prevents the Department's employees from recommending [to the state court] a range of planning options for children who are in [] custody." *Id.* at 1268. The court did not find that any provision of the decree required abstention,

instead remanding that question to the district court, which it conceded was more familiar with the "complexities" of the case. *Id.* at 1273. On remand, only a single provision of the remedial scheme at issue was found by the district court to interfere with the plaintiffs' [state court proceedings], even pursuant to the Tenth Circuit's "insidious interference" expansion of *Younger*. *See Joseph A. v. New Mexico Dept. of Human Servs.*, No. CIV 80-623 JC/DJS (D.N.M. Jan. 16, 2003).

iii. *No interference with state court proceedings required* – Sitting outside even the Tenth Circuit's recent extensions of *Younger* abstention is the Eleventh Circuit's decision, which petitioners submit requires no actual interference with the state court proceedings at issue, direct or indirect, but merely the adjudication of potentially overlapping issues by the federal and state proceedings. The court of appeals ruling extends beyond *J.B.*, because unlike in *J.B.*, petitioners here do not seek to challenge any custodial or other individual "dispositional" determinations of the juvenile courts. And it extends *Younger* beyond *Joseph A.*, because the district court here granted abstention on a motion to dismiss, essentially ruling that the court could grant no possible relief that would not create abstention problems. In *Joseph A.*, by contrast, specific relief, in a written settlement decree, had already been formulated, and the Tenth Circuit acknowledged that at least some relief would not conflict with the abstention doctrine. That ruling ultimately permitted the district court's line-by-line abstention review that resulted in that case surviving the *Younger* bar.

b. With respect to systemic foster care litigation of the general type at issue, the Eleventh Circuit's ruling in this

case, and the Tenth Circuit's determinations in *Joseph A.* and *J.B.* that the court of appeals expressly relies upon and expands, are directly at odds with the Ninth Circuit's ruling in *L.H. v. Jamieson*, 643 F.2d 1351 (9th Cir. 1981). All four cases consider the application of *Younger* abstention to child welfare reform litigation filed in federal court against executive branch defendants by foster children seeking prospective injunctive. In each case, the "interference" the executive defendants claim justify *Younger* abstention arises from the federal court action's supposed effect on periodic juvenile court reviews of the same generic type as the review proceedings at issue here.

Though the cases differ factually, on the relevant legal point the conflict is clear-cut. As discussed, the Eleventh Circuit here, and the Tenth Circuit in *J.B.* and *Joseph A.*, determined that the relief sought by petitioners violated the "interference" threshold to the first prong of *Middlesex*. In *L.H. v. Jamieson*, a case seeking additional funding for a group of private agencies that cared for a plaintiff class of Arizona foster children, the Ninth Circuit reached a contrary result, determining that there was no "interference" of the type barred by *Younger* in that:

> . . . . the juveniles are not seeking to enjoin any state proceeding, nor are they seeking to enjoin state officials from enforcing any state law. They are instead requesting an order that would require Arizona to spend more money to fund dispositional alternatives for juveniles in state custody. This relief may enrich the variety of dispositional alternatives available to a juvenile court judge, and, to this extent, affect pending and ongoing state juvenile proceedings. It does

> not, however, have the wholly disruptive consequences associated with enjoining a state judicial proceeding or enjoining further enforcement of a state statute.

643 F.2d at 1354.

Respectfully, the Court should grant review to resolve these general and specific conflicts on important issues of federal court jurisdiction.

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

Date: September 2, 2003

Respectfully submitted,

Karen Gievers
GIEVERS, P.A.
524 E. College Avenue,
Suite 2
Tallahassee, FL 32301
850-222-1961

William H. Fraser
LEGAL AID SOCIETY OF
PALM BEACH COUNTY,
INC.
423 Fern Street, Suite 200
West Palm Beach, FL
33401
561-655-8944

Bernard P. Perlmutter
Carolyn Salisbury
UNIV. OF MIAMI SCHOOL OF
LAW
5915 Ponce de Leon Blvd. #28
Coral Gables, FL 33146
305-284-3123

Marcia Robinson Lowry
Counsel of Record
Eric E. Thompson
Douglas C. Gray
CHILDREN'S RIGHTS, INC.
404 Park Ave. So., 11th Fl.
New York, NY 10016
212-683-2210

Christina A. Zawisza
CHILD ADVOCACY CLINIC
THE UNIV. OF MEMPHIS
SCHOOL OF LAW
109 N. Main St., 2nd Floor
Memphis, TN 38103
901-523-8822

ROY WASSON
1320 South Dixie Hwy.
Suite 450
Gables One Tower
Miami, FL 33146
305-666-5053

Deborah A. Schroth
FLORIDA LEGAL SERVICES
126 W. Adams St., #502
Jacksonville, FL 32202
904-355-5200

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-10180

---

31 FOSTER CHILDREN, on behalf of themselves and all other Children in Florida Foster Care,

Plaintiffs-Appellants

v.

JEB BUSH, as Governor of the State of Florida,
KATHLEEN KEARNEY, as Secretary of the Florida Department of Children and Families,
CHUCK BATES, District Administrator,
ROBERT WILLIAMS, District Administrator,
ESTER TIBBS, District Administrator, et al.,

Defendants-Appellees

On Appeal from the United States District Court
For the Southern District of Florida
(D.C. Docket No. 00-02116-CV-FAM)

May 8, 2003

Before ANDERSON and CARNES, Circuit Judges, and HAND*, District Judge.

CARNES, Circuit Judge.

This case involves a proposed class action brought on behalf of all children in Florida's foster care system against the Governor of Florida, the Secretary of Florida's Department of Children and Families ("the Department"), and the administrators of fourteen of the Department's fifteen districts, all of whom collectively administer Florida's foster care system. The individual plaintiffs' amended complaint alleges widespread deficiencies in the state's foster care system, in violation of the United States Constitution and federal statutory law. The plaintiffs appeal the district court's order insofar as it grants the defendants' motions to dismiss parts of the amended complaint on grounds of Younger v. Harris abstention and Eleventh Amendment immunity.

In Part I of this opinion, we set out the allegations contained in the multi-count complaint and the procedural history of the case. In Part II, we address the justiciability concerns raised by the defendants and conclude that although the claims of two of the plaintiffs are moot, the other plaintiffs have standing to pursue their claims. In Part III, we review the plaintiffs' federal statutory claims and affirm the district court's order dismissing those claims, because the statutes at issue do not give rise to enforceable rights. In Part IV, we discuss the Younger abstention doctrine and conclude that the district court did not abuse its discretion in abstaining from deciding the plaintiffs' claims. Part V contains our conclusions and instructions for the district court on remand.

---

* Honorable William B. Hand, United States District Judge for the Southern District of Alabama, sitting by designation.

I. THE COMPLAINT AND PROCEDURAL HISTORY

In June of 2000, the plaintiffs filed suit on behalf of themselves and a statewide class of children in custody of the defendants. The amended complaint contains six counts, alleging that the defendants' practices deny and threaten the plaintiffs'[1] claimed rights to: (1) safe care that meets their basic needs, prompt placements with permanent families, and services extended after their eighteenth birthdays, as guaranteed by substantive due process (Count I); (2) procedural due process in determining the services they will receive (Count II); (3) family association with siblings as guaranteed by the First, Ninth, and Fourteenth Amendments (Count III); (4) prompt placement with permanent families and to have their medical and educational backgrounds provided to their care givers, as guaranteed by 42 U.S.C. §§ 675(5)(D) and (E), which are provisions of the Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500, 516 (June 17, 1980) (codified as amended at 42 U.S.C. §§ 620-628 and §§ 670-679a) ("the Adoption Act") (Count IV); (5) health screening and followup under schedules established pursuant to the Medicaid Act, 42 U.S.C. §§ 1396a(a)(43)(B), 1396(a)(43)(C), and 1396d(r) (Count V); and (6) in the case of the black plaintiff foster children, freedom from racial discrimination in the provision of care and services, as guaranteed by Title VI of the 1964 Civil Rights Act (Count VI).

The plaintiffs brought their lawsuit under 42 U.S.C. § 1983, seeking declaratory and injunctive relief relating to the

---

[1] The plaintiffs who filed the amended complaint are: Bonnie L., Reggie B., Rebecca B., Laurie S., Lillie S., Leslie F., Sandra M., Tanya M., Candice D., Jay D., Matthew I., Hugh S., Leanne G., Tammy G., Elaine R., Paul B., Rachel C., Cathy W., Larissa C., John J., Melinda, and Karina.

operation of Florida's foster care system. Specifically, they requested that the court:

(1) declare unconstitutional and unlawful the following alleged practices: (a) the failure to provide for the plaintiffs' basic needs, safety, freedom from harm, freedom from unreasonable restraints on their liberty, care and treatment, freedom from being placed into unnecessary state-created danger, and freedom from arbitrary and capricious actions and decisions that deprive them of benefits to which they are entitled; (b) deprivation of state-created entitlements without an adequate and fair procedure; (c) unnecessary separation of siblings and denial of visitation among them; (d) failure to comply with the Adoption Act and the Medicaid Act; and (e) discrimination on the basis of race;

(2) enjoin the Department and the defendants from violating the plaintiffs' constitutional rights, including those described in (1) above;

(3) order appropriate remedial relief to ensure compliance with the Constitution and laws of the United States;

(4) appoint an expert panel to develop and oversee the implementation of a plan for reform;

(5) appoint a permanent ombudsman or children's advocate to present the plaintiffs' interests to the defendants, and require the defendants to meet regularly and frequently with that ombudsman; and

(6) grant other equitable relief as the court sees fit.

After amending the complaint, the plaintiffs moved to certify the statewide class of all children who are or would be in foster care in Florida, along with a subclass of black children.[2] Upon motion of the defendants, the court appointed a guardian ad litem, who concluded after investigation that "a class action lawsuit is an appropriate mechanism to secure a remedy for all the children in State custody . . . [and] that the prosecution of this lawsuit to a final resolution . . . will be in the best interests of the Plaintiff children and the class they represent."

The district court dismissed all of the plaintiffs' claims on the pleadings. It ruled that Count IV, which involves the Adoption Act claims, is barred by the Eleventh Amendment and dismissed those claims with prejudice. The court also dismissed with prejudice the constitutional claims — Counts I, II, and III — as to all plaintiffs who are not in extended foster care (which exists only for persons age 18 or older); it did so based upon the abstention doctrine of Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746 (1971). The court dismissed with prejudice the portion of Count VI that alleges disparate impact discrimination under Title VI of the Civil Rights Act of 1964. Concluding that the amended complaint was not a "short and plain statement" of claims, the court dismissed all the other claims (including the Title VI claims for intentional discrimination) in the amended complaint without prejudice, granting the plaintiffs leave to replead those claims that had not been dismissed on some other basis.

Thereafter, eleven of the twenty-two named plaintiffs who had filed the amended complaint settled all of their

---

[2] The class description was later modified to exclude children who were plaintiffs in a separate class action involving only children in foster care in Broward County.

claims, executed a release, and are no longer part of the lawsuit. Some of the eleven plaintiffs who remain in the lawsuit also settled some of their claims. More specifically, all the intentional racial discrimination claims and all the Medicaid Act claims have been settled and dismissed.[3] The settlement left no unadjudicated claims pending in the district court.

The plaintiffs who appealed to this Court are the remaining eleven named plaintiffs still in foster care in Florida for persons under the age of eighteen.[4] The issues they raise in this appeal concern only Counts I through IV, which involve some of the claims that were dismissed with prejudice.[5]

II. JUSTICIABILITY

Initially, we are faced with some threshold questions about whether the plaintiffs' claims present a justiciable case or controversy. Specifically, we must decide whether the claims of two of the plaintiffs are moot and whether the other plaintiffs have standing to challenge the practices at issue.

A. MOOTNESS

The exercise of jurisdiction by the federal courts "depends upon the existence of a case or controversy."

---

[3] Because of that settlement, none of the plaintiffs filed an amendment to the complaint repleading those claims, even though the district court's dismissal of them had been without prejudice.

[4] They are: Reggie B., Rebecca B., Laurie S., Lillie S., Tanya M., Leanne G., Tammy G., Elaine R., Rachel C., Larissa C., and John J.

[5] Although the disparate impact portion of the black children's Title VI claims in Count VI was also dismissed with prejudice, the plaintiffs do not contest that ruling.

North Carolina v. Rice, 404 U.S. 244, 246, 92 S. Ct. 402, 404 (1971) (citation and internal quotation marks omitted). "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Powell v. McCormack, 395 U.S. 486,496, 89 S. Ct. 1944, 1951 (1969). "Put another way, [a] case is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief." Fla. Ass'n of Rehab. Facilities. Inc. v. Fla. Dep't of Health & Rehabilitative Servs., 225 F.3d 1208, 1217 (11th Cir. 2000) (citations and internal quotation marks omitted). We consider questions of mootness under a plenary standard of review. United States v. Fla. Azalea Specialists, 19 F.3d 620, 621 (11th Cir. 1994).

The defendants contend that Larissa C.'s and Leanne G.'s claims are moot, and we agree. Because Larissa C. and Leanne G. have been adopted, they are no longer in the defendants' legal or physical custody and therefore cannot be further harmed by the defendants' alleged illegal practices. Because the plaintiffs' amended complaint seeks only prospective injunctive relief against the defendants to prevent future harm, no live controversy exists between them and these two plaintiffs. Larissa C. and Leanne G. have no legally cognizable interest in the outcome of this lawsuit. All of their claims are moot.

B. STANDING

The three prerequisites for standing are that: (1) the plaintiff have suffered an "injury in fact" — an invasion of a judicially cognizable interest, which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) there be a causal connection between that injury and the conduct complained of — the injury must be fairly traceable to the challenged action of the defendant, and

not the result of the independent action of some third party not before the court; and (3) it be likely, not merely speculative, that the injury will be redressed by a favorable decision. Bennett v. Spear, 520 U.S. 154, 162, 117 S. Ct. 1154, 1161 (1997). These three elements "constitute[] the core of Article III's case-or-controversy requirement." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103-04, 118 S. Ct. 1003, 1017 (1998).

The plaintiffs bear the burden of establishing each of the three standing elements. Bennett, 520 U.S. at 167-68, 117 S. Ct. at 1163-64. How much evidence is necessary to satisfy that burden depends on the stage of litigation at which the standing challenge is made. Id. At the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 2137 (1992) (citations and internal marks omitted).

Because Larissa C.'s and Leanne G.'s claims are moot, we have nine remaining plaintiffs who appealed to this Court and for whom the standing question matters: Reggie B., Rebecca B., Laurie S., Lillie S., Tanya M., Tammy G., Elaine R., Rachel C., and John J. Taking the allegations of the complaint as true for present purposes, as we must, Pompey v. Broward County, 95 F.3d 1543, 1548 n.6 (1th Cir. 1996), we will proceed count-by-count as to all the injury claimed by the plaintiffs who have appealed to this Court.

In Count I, the plaintiffs claim that the defendants have violated their substantive due process rights by engaging in a pattern and practice of failing to meet their

obligations in the following ways: failing to satisfy the plaintiffs' basic needs for food, clothing, and shelter, as well as for medical, educational and other services; failing to provide safe care and placements that protect the plaintiffs from harm and services that prevent or ameliorate harm; and failing to provide the plaintiffs with care consistent with the purposes for which the defendants assumed custody of them.

As additional claimed violations of their substantive due process rights in Count I, eight of the nine remaining plaintiffs — Tanya M., Laurie S., Lillie S., Elaine R., Rachel C., Reggie B., John J., and Tammy G. — assert that the defendants knowingly placed and retained them in foster care placements that were dangerous, abusive, neglectful, overcrowded, or wholly inappropriate for meeting the children's needs. The plaintiffs further claim that the defendants ignore or inappropriately respond to complaints or other information identifying certain placements as dangerous, abusive, neglectful, overcrowded, or wholly inappropriate for meeting the children's needs, and have done so in the placements of Tanya M., Laurie S., Lillie S., Tammy G., and John J. Further, the defendants are alleged to have engaged in a pattern and practice of placing some children, including Rachel C. and Tammy G., in temporary shelters or group homes on a long-term basis because of the unavailability of foster homes to accommodate them. They are alleged to have retained children, including Laurie S., Lillie S., Reggie B., and Rebecca B., in foster care longer than necessary and to have subjected children to multiple, unwarranted placements. The position of the plaintiffs is that the defendants have a pattern and practice of engaging in the conduct alleged in Count I, which has caused and continues to cause the plaintiffs injury.

In Count II, the plaintiffs assert violations of procedural due process. They allege that the defendants have

failed to establish a process for an administrative hearing or professional review of decisions that deny the plaintiffs benefits to which they are entitled, including caseworker supervision of children in foster care and shelter care, medical care, foster care after reaching the age of majority, and participation in a subsidized Independent Living Program. Specifically, it is alleged that Reggie B. has been and continues to be injured by this pattern and practice, because he has been denied treatment necessary to repair a cleft palate and for other medical needs.

In Count III, eight of the remaining plaintiffs — Tanya M., Tammy G., Laurie S., Lillie S., John J., Elaine R., Reggie B., and Rebecca B. — claim that the defendants have violated their First, Ninth, and Fourteenth Amendment rights by unnecessarily separating them from their siblings and depriving them of regular and frequent visitation with their separated siblings. They allege that the defendants have a pattern and practice of doing so, and that it has harmed them.

In Count IV, the plaintiffs allege that the defendants have violated rights granted them under the Adoption Act. Specifically, Laurie S., Lillie S., Reggie B., and Rebecca B. claim that the defendants routinely fail to initiate proceedings for termination of parental rights to children in their custody for 15 of the most recent 22 months as required under 42 U.S.C. § 675(5)(E), and that they have been harmed by this practice. Reggie B. also alleges specifically that his health and education records were not provided to foster parents or foster care providers immediately upon his placement in a home or facility, as required under 42 U.S.C. § 675(5)(D), and the other eight remaining plaintiffs allege generally that the defendants routinely fail to obtain the required information, update it, or provide a record of the information to each foster home or facility.

The defendants contend that none of the plaintiffs has standing to bring claims under Count II (procedural due process) or Count IV (Adoption Act). With regard to Count I (substantive due process), the defendants contend that only four plaintiffs — Laurie S., Lillie S., Reggie B., and Rebecca B. — have standing to claim that they have been in foster care longer than reasonably necessary. They contend that only three plaintiffs — Tammy G., Laurie S., and Lillie S. — have standing to bring a claim under Count III (sibling association) for failure to be placed in a foster home with their siblings. Finally, they contend that only two plaintiffs — Elaine R. and Tammy G. — have standing to raise a claim under Count III for failure to allow visitation with siblings. The defendants' basis for claiming that most plaintiffs lack standing for these claims is that most of them fail to allege either a palpable injury or the imminent risk of harm.[6] Instead, according to the defendants, most of the plaintiffs complain about past harms and seek relief for aspects of the Florida foster care system that have not caused them injury.

In order to satisfy the "injury in fact" requirement of standing, a plaintiff need not wait for an injury to occur. An

---

[6] In addition to injury in fact, plaintiffs must also allege that their injuries are "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court," and that it is likely the injury will be redressed if the court rules in their favor. Bennett v. Spear, 520 U.S. 154, 167, 117 S. Ct. 1154, 1163 (1997). These aspects of standing are not disputed in this case. According to the amended complaint, the defendants' failures caused the plaintiffs' injuries and their continued failures are likely to cause further injuries. The plaintiffs do allege that their injuries are related to the challenged conduct of the defendants. Therefore, the alleged injuries suffered by the plaintiffs are fairly traceable to the conduct of the defendants. In addition, the plaintiffs seek a declaratory judgment and prospective injunctive relief that will prevent the defendants from violating their constitutional and federal statutory rights. The relief the plaintiffs seek would clearly remedy their claimed injuries.

allegation of future injury satisfies this prong of standing so long as the alleged injury is "imminent" or "real and immediate" and not merely "conjectural" or "hypothetical." Lujan, 504 U.S. at 560, 112 S. Ct. at 2136; City of Los Angeles v. Lyons, 461 U.S. 95, 101-02, 103 S. Ct. 1660, 1665 (1983). An injury is imminent if it is likely to occur, and likely to do so immediately. Lujan, 504 U.S. at 560, 112 S. Ct. at 2136.

When a plaintiff cannot show that an injury is likely to occur immediately, the plaintiff does not have standing to seek prospective relief even if he has suffered a past injury. For example, in Lyons, the plaintiff sought to enjoin the use of "chokeholds" by police officers. 461 U.S. at 98, 103 S. Ct. at 1663. The Court stated that the plaintiffs standing to seek that relief hinged on "whether he was likely to suffer future injury from the use of the chokeholds by police officers." Id. at 105, 103 S. Ct. at 1667. The Court held that the plaintiff lacked standing, because the probability of future injury was too speculative, id. at 106-07, 103 S. Ct. at 1667-68, explaining:

> In order to establish an actual controversy in this case, [the plaintiff] would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either (1) that all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter . . . or (2) that the City ordered or authorized police officers to act in such manner.

Id. at 105-06, 103 S. Ct at 1667. As Lyons illustrates, future injury that depends on either the random or unauthorized acts of a third party is too speculative to satisfy standing requirements. However, when the threatened acts that will

cause injury are authorized or part of a policy, it is significantly more likely that the injury will occur again. See id. at 106, 103 S. Ct. at 1667 (plaintiff may have had standing if he had alleged "that the City ordered or authorized police officers to [perform illegal chokeholds]").

This case is more like Church v. City of Huntsville, 30 F.3d 1332 (11th Cir. 1994), than Lyons. In Church, the plaintiffs were homeless persons who sought an injunction against the City of Huntsville to prevent the City and its employees from harassing, intimidating, detaining, and arresting them solely because they were homeless, as part of a concerted effort to drive them out of the city. Id. at 1335. We held that the plaintiffs had standing, because they were far more likely than the Lyons plaintiff to have future encounters with the police, were homeless involuntarily, and could not "'avoid future exposure to the challenged course of conduct'" in which the City engaged. Id. at 1338 (quoting O'Shea v. Littleton, 414 U.S. 488, 497, 94 S. Ct. 669, 677 (1974)). Importantly, the Church plaintiffs alleged that municipal policy authorized the constitutional deprivations they claimed and that the City had a "custom, practice and policy" of engaging in the challenged conduct. Id. at 1339.

For the reasons that the Church plaintiffs had standing, the plaintiffs in this case who are in the defendants' physical custody have standing to pursue their substantive due process claims (Count I). The plaintiffs who are in the defendants' physical custody and have siblings in the defendants' custody — Tammy G., Laurie S., Lillie S., John J., Reggie B., and Rebecca B. — have standing to pursue their sibling association claims (Count III). These plaintiffs are in much the same legal position as the Church plaintiffs. They are in the custody of the defendants involuntarily and will be until they are returned to their parents, are adopted, or reach the age of majority. They cannot avoid exposure to the

defendants' challenged conduct. The alleged systemic deficiencies in the Florida foster care system are similar to an injurious policy, and different from the random act at issue in Lyons. The alleged pattern and practice in this case presents a substantial likelihood that the alleged injury will occur. See Church, 30 F.3d at 1339.

Moreover, the plaintiffs' allegations under Counts I and III support the conclusion that future injury will proceed with a high degree of immediacy. The Supreme Court addressed this aspect of the injury in fact requirement in Lujan, holding that because the plaintiffs failed to demonstrate their injury would "proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all," they lacked standing to pursue their claim. 504 US. at 559, 564 n.2, 112 S. Ct. at 2135-36, 2138 n.2. Thus, under Lujan, one cannot merely allege that an injury will be suffered at "some time" in the future. However, a plaintiff need not demonstrate that the injury will occur within days or even weeks to have standing. See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211-12, 115 S. Ct. 2097, 2105 (1995) (plaintiff who was likely to suffer injury within one year period had standing to sue). The court must make a qualitative inquiry into this question. See Wilderness Soc'y v. Alcock, 83 F.3d 386, 390 (11th Cir. 1996) (when determining standing, court focuses on qualitative sufficiency of the injury). In this case, for those plaintiffs who are in the physical custody of the defendants, the degree of immediacy is sufficiently high that there is little likelihood the district court will be deciding a case "in which no injury would have occurred at all." Lujan, 504 U.S. at 564 n.2, 112 S. Ct. at 2138 n.2.

However, the two plaintiffs who are not in the defendants' physical custody lack standing to pursue the

constitutional claims under Counts I and III. The amended complaint states that Tanya M. has run away, and at oral argument the plaintiffs' counsel referred to Elaine R. as one of the "hundreds of missing children." Plaintiffs who are not in the defendants' physical custody cannot demonstrate that their constitutional injuries are imminent. They may return to the defendants' physical custody, but they may not. If they do not return to the defendants' physical custody, then they will never be harmed by the alleged practices of the defendants. It follows that they cannot demonstrate any injury that would "proceed with a high degree of immediacy." Id.

Only Reggie B. has standing to pursue the procedural due process claims set out in Count II, because he is the only plaintiff who has demonstrated injury in fact as to that claim. He claims that he has been denied medical care to repair a cleft palate (and other unspecified medical care) and that the defendants have not provided a process for review of that denial. If his cleft palate has not been repaired, he has been denied an alleged entitlement, and he is asking for procedural protections he claims have not been provided. His is a concrete injury that is real and immediate. Id. at 560, 112 S. Ct. at 2136. The other plaintiffs, however, have not alleged that they have been denied any entitlement. Without such an allegation, the other plaintiffs are essentially asserting that they will be denied a benefit in the future, and that when that happens, the defendants will provide them with no process for reviewing the denial. The plaintiffs' procedural due process claims are different from their substantive due process claims because the procedural injury requires two steps: the defendants must deny the plaintiffs a benefit and then deny them process. Such an injury may never occur. See id. at 564 n.2, 112 S. Ct. at 2138 n.2.

As to the Adoption Act claims in Count IV, all of the plaintiffs whose parents' parental rights have not been

terminated within the period set out in the statute have standing to pursue a claim under 42 U.S.C. § 675(5)(E). Their claimed injury is concrete. In the amended complaint, Laurie S., Lillie S., Reggie B., and Rebecca B. present such claims. Other plaintiffs, the ones who have not been in the defendants' custody for the statutory period, do not have standing to bring a claim under § 675(5)(E), because they may not be injured at all; they may return to their parents' custody.

All of the remaining plaintiffs in the defendants' physical custody have claims under 42 U.S.C. § 675(5)(D) for the defendants' failure to provide updated health and education records to the plaintiffs' foster caregivers for the same reasons that they have standing to pursue their substantive due process claims. Because it is alleged that the defendants routinely fail to obtain the required information, update the records, and provide the information to the foster caregivers, all children who are within the defendants' physical custody are at risk of immediate harm from that pattern and practice.

In sum, Larissa C.'s and Leanne G.'s claims are moot because they have been adopted. Reggie B., Rebecca B., Laurie S., Lillie S., Tammy G., Rachel C., and John J. have standing to pursue their Count I claims. Reggie B. has standing to pursue his Count II claims. Tammy G., Laurie S., Lillie S., John J., Reggie B., and Rebecca B. have standing to pursue their Count III claims. Laurie S., Lillie S., Reggie B., and Rebecca B. have standing to pursue their Count IV claims for failure to terminate parental rights in the statutory period. Reggie B., Rebecca B., Laurie S., Lillie S., Tammy G., Rachel C., and John J. have standing to pursue their Count IV claims for failure to provide updated health and education records to foster caregivers.

III. THE PLAINTIFFS' CLAIMS UNDER § 1983 FOR VIOLATIONS OF §§ 675(5)(D) AND (E) OF THE ADOPTION ACT

Because some of the plaintiffs have standing to pursue their Adoption Act claims, we must now decide whether 42 U.S.C. § 675(5)(D) and (E) provide rights enforceable under 42 U.S.C. § 1983.[7] It provides a federal remedy for violations not only of the Constitution but federal statutes as well. Maine v. Thiboutot 448 U.S. 1, 100 S. Ct. 2502 (1980). In order to have a viable cause of action under § 1983 based on the violation of a federal statute, however, a plaintiff must establish that the statute allegedly violated gives the plaintiff enforceable rights. Gonzaga Univ. v. Doe, 536 U.S. 273, 283, 122 S. Ct. 2268, 2275 (2002) (rejecting the notion that case law permits "anything short of an unambiguously conferred right to support a cause of action brought under § 1983").

We emphasize, as did the Court in Gonzaga, that in cases brought to enforce legislation enacted pursuant to Congress' spending power, such as the Adoption Act, Congress must "speak with a clear voice" and manifest an "unambiguous" intent to confer individual rights before federal funding provisions will be read to provide a basis for private enforcement. Id. at 280, 122 S. Ct. at 2273 (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17, 28 & n.2l, 101 S. Ct. 1531, 1540, 1545 & n.21) (1981)). "In

---

[7] The district court did not decide this question, instead dismissing the plaintiffs' Adoption Act claims as barred by the Eleventh Amendment under Seminole Tribe of Florida v. Florida, 517 U.S. 44, 116 S. Ct. 1114 (1996). In view of our conclusion that the Adoption Act claims are due to be dismissed on other grounds, we need not address the Eleventh Amendment issue. McClendon v. Ga. Dep't of Cmty. Health, 261 F.3d 1252, 1258-59 (11th Cir. 2002).

legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State." Pennhurst, 451 U.S. at 28, 101 S. Ct. at 1545. Only twice since Pennhurst has the Supreme Court held that spending legislation gave rise to rights enforceable via § 1983. See Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 110 S. Ct. 2510 (1990) (holding that health care providers could, pursuant to § 1983, enforce the Boren Amendment to the Medicaid Act); Wright v. Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 107 S. Ct. 766 (1987) (holding that the Brooke Amendment to the Housing Act provided a cause of action under § 1983).

The Supreme Court has set forth three requirements that must be met before a federal statute will be read to confer a right enforceable under § 1983: (1) Congress must have intended that the provisions in question benefit the plaintiff; (2) the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial resources; and (3) the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms. Blessing v. Freestone, 520 U.S. 329, 340-41, 117 S. Ct. 1353, 1359 (1997). The Supreme Court in Gonzaga clarified the first of the Blessing requirements, making it plain that only unambiguously conferred rights, as distinguished from mere benefits or interests, may be enforced under § 1983. 536 U.S. at 283, 122 S. Ct. at 2275 (rejecting the notion private plaintiffs have enforceable federal rights merely because they are the intended beneficiaries of a statute or fall within its zone of interest).

The Court held in Gonzaga that a private plaintiff could not bring an action under § 1983 to enforce provisions

of the Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g. In FERPA Congress directed the Secretary of Education to deny federal funding to any state with a policy or practice of permitting the unauthorized release of education records or personal information. Congress was explicit about it, saying: "No funds shall be made available. . . to any [school] which has a policy or practice of permitting the release of education records . . . of students without the written consent of their parents . . ." 20 U.S.C. § 1232g(b)(1).

In holding that FERPA does not create a right enforceable under § 1983, the Supreme Court explained that the act lacks "rights-creating" language critical to showing congressional intent to create new rights. Instead, the act speaks only to the Secretary of Education, directing him to withhold funds if the prohibited practice exists. Gonzaga, 536 U.S. at 287, 122 S. Ct. at 2277. The Court contrasted FERPA's language that "[n]o funds shall be made available," with the individually focused language of Titles VI and IX, which mandate that "[n]o person . . . shall . . . be subjected to discrimination," statutes that do create enforceable rights, see Cannon v. Univ. of Chicago, 441 U.S. 677, 99 S. Ct. 1946 (1979). The Court concluded in Gonzaga that the focus of FERPA is "two steps removed from the interests of individual students and parents." 536 U.S. 287, 122 S. Ct. at 2277. Instead of creating an enforceable duty on the part of the school, the act only imposed a duty on the part of the federal government — the duty to withhold funds.

A second reason the Supreme Court gave in Gonzaga for concluding that FERPA does not create enforceable rights is that its nondisclosure provisions speak only in terms of institutional policy and practice, not about "individual instances of disclosure." Id. at 288, 122 S. Ct. at 2278. The provisions therefore have an aggregate focus, instead of a

concern for "whether the needs of any particular person have been satisfied." Id. (citation omitted). Also thought significant is the fact that institutions can avoid funding termination under FERPA by substantial compliance with the act's requirements; compliance in every case is not necessary to avoid loss of funding. Id.

Finally, the Supreme Court considered in Gonzaga the mechanism that Congress chose to provide for enforcing the provisions of FERPA. The act expressly authorizes the Secretary of Education to "deal with violations" of it and to establish a review board for investigating and adjudicating such violations. 20 U.S.C. § 1232g(f). The Secretary's regulations create an office to act as a review board, and students can file individual written complaints with that office. This review mechanism, the Court concluded, evidences a congressional intent to avoid the multiple interpretations of FERPA that might arise if the act created enforceable individual rights. Gonzaga, 536 at 289-90, 122 S. Ct. at 2278-79.

We take from Gonzaga the lesson that we are to look at the text and structure of a statute in order to determine if it unambiguously provides enforceable rights. If the text and structure "provide no indication that Congress intends to create new individual rights, there is no basis for a private suit." Id. at 286, 122 S. Ct. at 2277. If they provide some indication that Congress may have intended to create individual rights, and some indication it may not have, that means Congress has not spoken with the requisite "clear voice." Ambiguity precludes enforceable rights. Id. at 280, 122 S. Ct. at 2273. The first Blessing requirement, which is what Gonzaga addressed, is that Congress must have intended that the provision in question benefit the plaintiff. Factors to consider in determining if it did include whether the statute: (1) contains "rights-creating" language that is

individually focused; (2) addresses the needs of individual persons being satisfied instead of having a systemwide or aggregate focus; and (3) lacks an enforcement mechanism through which an aggrieved individual can obtain review.

Turning to the specific legislation at hand, the Adoption Act comprises Parts B and E of Title IV of the Social Security Act and is a federal funding statute that establishes a program of payments to states for foster care and adoption assistance. 42 U.S.C. § 620-628, 670-679a. Sections 675(5)(D) and (E) are found in Part E. For a state to receive funds under Part E, it must satisfy certain requirements. The state must submit for approval by the Secretary of Health and Human Services a plan for foster care and adoption assistance. 42 U.S.C. § 671(a). If a state follows its approved plan, it receives federal funds. 42 U.S.C. § 670; 42 U.S.C. § 1320a-2a.

If the state does not follow its approved plan, it may lose all or some of the federal funds it otherwise would receive. Section 1320a-2a requires the Secretary to promulgate regulations for use in reviewing state programs in order to determine whether the programs are in substantial conformity with the state plan. 42 U.S.C. § 1320a-2a(a)(3). Under the statute, the regulations must require the Secretary to withhold federal funds if a state has failed to substantially conform to its approved plan, id. § 1320a-2a(b)(3), and the regulations do exactly that, 45 C.F.R. §§ 1355.35(c)(4), 1355.36(b).

The plaintiffs in this case brought suit under § 675, a section that provides definitions for both Parts B and E, including a definition for the term "case review system." 42 U.S.C. § 675(5). The plaintiffs' position is that those provisions relating to a case review system give them an

enforceable right under the statute. Section 675(5) provides, in relevant part:

> The term "case review system" means a procedure for assuring that —
>
> (D) a child's health and education record (as described in paragraph (1)(A)) is reviewed and updated, and supplied to the foster parent or foster care provider with whom the child is placed, at the time of each placement of the child in foster care;
>
> (E) in the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months, or, if a court of competent jurisdiction has determined a child to be an abandoned infant (as defined under State law) or has made a determination that the parent has committed murder of another child of the parent, committed voluntary manslaughter of another child of the parent, aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter, or committed a felony assault that has resulted in serious bodily injury to the child or to another child of the parent, the State shall file a petition to terminate the parental rights of the child's parents (or, if such a petition has been filed by another party, seek to be joined as a party to the petition). 42 U.S.C. § 675(5).

Because §§ 675(5)(D) and (E) are definitional in nature, they alone cannot and do not supply a basis for conferring rights enforceable under § 1983. See Gonzaga, 536 U.S. at 280, 122 S. Ct. at 2273; see also Charlie H. v. Whitman, 83 F. Supp. 2d 476, 490 (D.N.J. 2000) (§ 675(5), standing alone, does not confer a right enforceable under § 1983); B.H. v. Johnson, 715 F. Supp. 1387, 1401 (N.D. Ill.

1989) ("It would be strange for Congress to create enforceable rights in the definitional section of a statute.").

Other than the definition, the only provision in Part E of Title IV that uses the term "case review system" is 42 U.S.C. § 671(a)(16). That section conditions receipt of federal funds on the existence of a state plan that, among other things, provides for "a case review system which meets the requirements described in section 675(5)(B) . . . with respect to each such child." Section 671(a)(16) does not go beyond that and explicitly require a plan to meet the requirements described in §§ 675(5)(D) and (E).

The plaintiffs contend otherwise. They argue that we should not interpret § 671(a)(16) to require compliance only with § 675(5)(B) in order for states to receive federal funds, but we think that is the most logical interpretation. The statute plainly directs that the state must have a plan that provides for a case review system "which meets the requirements described in section 675(5)(B) of this title." 42 U.S.C. § 671(a)(16). It does not say that a plan's case review system must meet the requirements of §§ 675(5)(D) and (E). Moreover, in other provisions of the Adoption Act, provisions that are codified in Part B of Title IV, Congress has required compliance with all of § 675(5) in order for a state to receive funds.[8] The conclusion we reach is that

---

[8] Part B creates a joint federal-state program that provides federal funds for child welfare services. In order to be eligible for these funds, 42 U.S.C. § 622(b)(10)(B)(ii) requires that each state have a plan for child welfare services that "provide[s] assurances that the State — is operating, to the satisfaction of the Secretary — a case review system (as defined in section 675(5) of this title) for each child receiving foster care under the supervision of the State." Another provision, 42 U.S.C. § 626(b)(3), requires that, in order for states to receive funds for projects for the development of alternate care arrangement for infants who do not need to

Congress knew how to require compliance with all aspects of a case review system, as described in § 675(5), when it wanted to do so. It did not choose to do so in § 671(a)(16).

Additionally, §§ 675(5)(D) and (E) do not have the kind of focused-on-the-individual, rights-creating language required by Gonzaga. Instead, the language of those provisions gives them an aggregate or system wide focus instead of one that indicates concern with whether the needs of any particular child are met. Gonzaga, 536 U.S. 288, 122 S. Ct. at 2277-78. Although the text of the provisions speaks to "a child's health and education record" provided at "each placement of the child" and to termination of the parental rights of "the child's parents," the case review system as a whole is defined as "a procedure for assuring" that the desired steps are taken. 42 U.S.C. § 675(5). The references to individual children and their placements are made in the context of describing what the procedure is supposed to ensure, and such provisions "cannot make out the requisite congressional intent to confer individual rights enforceable by § 1983." Gonzaga, 536 U.S. at 289, 122 S. Ct. at 2278.

---

be in hospital settings, the state develop "a case review system of the type described in § 675(5) of this title" for each infant.

The plaintiffs have not sued under either 42 U.S.C. § 622(b)(10)(B)(ii) or § 626(b)(3), which are in Part B, and instead have repeatedly said that their claims arise under Part E. Section 671(a)(16) is the only section in Part E that refers to a "case review system." So, we have confined our consideration to it. However, other courts have found that § 622(b)(10)(B)(ii), at least, does not confer an enforceable right. See Charlie H. v. Whitman, 83 F. Supp. 2d 476, 485-89 (D.N.J. 2000) (§ 622(b)(10)(B)(ii) is not so unambiguous as to confer a right enforceable under § 1983); Eric L. v. Bird, 848 F. Supp. 303, 312 (D.N.H. 1994) (plaintiffs have no enforceable right to compel state's implementation of programs under predecessor to § 622(b)(10)(B)(ii)).

Further, Congress has required the Secretary of Health and Human Services to promulgate regulations for the review of the child welfare and adoption assistance programs set out in Parts B and E in order "to determine whether such programs are in substantial conformity with — State plan requirements under such parts B and E." 42 U.S.C. § 1320a-2a(a)(1) (emphasis added). The substantial conformity requirement is similar to FERPA's, which the Court in Gonzaga concluded showed an aggregate instead of an individual focus. 536 U.S. at 288, 122 S. Ct. at 2278; see also Blessing, 520 U.S. at 335, 343, 117 S. Ct. at 1357, 1361 (holding that Title IV-D of the Social Security Act did not support a right enforceable pursuant to § 1983, in part because the statute mandated "substantial compliance" with federal regulations).

As for enforcement of §§ 675(5)(D) and (E), it is true that the statutes do not contain "a remedial scheme sufficiently comprehensive to demonstrate congressional intent to preclude the remedy of suits under § 1983." Blessing, 520 U.S. at 346, 117 S. Ct. at 1362 (internal marks omitted). In fact, the Adoption Act contains no mechanism by which aggrieved individuals can enforce its provisions. Instead, the Secretary enforces the Adoption Act by requiring the implementation of corrective action or withholding federal funds if the states fail to comply with an approved plan. See 42 U.S.C. § 1320a-2a. Federal regulations require that the Secretary audit states to determine whether they are in compliance. 45 C.F.R. §§ 1355.32-33; 1355.36. This enforcement scheme is not like those that have been held by the Supreme Court to preclude suits under § 1983. See Gonzaga, 536 U.S. at 289-90, 122 S. Ct. at 2278-79 (creation of centralized review board for individual complaints and enforcement of FERPA precluded private suits); Smith v. Robinson, 468 U.S. 992, 1010-12, 104 S. Ct. 3457, 3467-68 (1984), superseded in part by 20 U.S.C. § 1415 (review

scheme in Education of the Handicapped Act permitting aggrieved individuals to invoke "carefully tailored" local administrative procedures followed by federal judicial review precluded § 1983 suits because such suits would "render superfluous most of the detailed procedural protections outlined in the statute'); Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 13, 20, 101 S. Ct. 2615, 2623, 2626-27 (1981) ("unusually elaborate enforcement provisions" of the Federal Water Pollution Control Act, which provided many enforcement options, including noncompliance orders, civil suits, and criminal penalties and authorized private persons to initiate enforcement actions, foreclosed § 1983 suit). Nonetheless, in this case, the lack of an enforcement mechanism by which an aggrieved individual can obtain review is but one of the factors we consider. The others point in the other direction and prevent us from saying that Congress spoke with a clear voice to unambiguously manifest its intent to create enforceable rights.

One other, more specific argument of the plaintiffs needs to be discussed. They contend that § 103(c) of the Adoption and Safe Families Act of 1997 (ASFA), Pub. L. No. 105-89, 111 Stat. 2115,2119, shows that Congress intended that the right to have parental rights termination proceedings initiated within the statutory period be an enforceable right for children in foster care. Section 103(c) provides:

> (1) NEW FOSTER CHILDREN.— In the case of a child who enters foster care... under the responsibility of a State after the date of the enactment of this Act—
>
> (A) if the State comes into compliance with the amendments made by [section 103(a), which amended the Adoption Act] before the child has been

> in such foster care for 15 of the most recent 22 months, the State shall comply with [42 U.S.C. § 675(5)(E)] with respect to the child when the child has been in such foster care for 15 of the most recent 22 months; and
>
> (B) if the State comes into such compliance after the child has been in such foster care for 15 of the most recent 22 months, the State shall comply with [42 U.S.C. § 675(5)(E)] with respect to the child not later than 3 months after the end of the first regular session of the State legislature that begins after such date of enactment.
>
> (2) CURRENT FOSTER CHILDREN.— In the case of children in foster care under the responsibility of the State on the date of the enactment of this Act, the State shall—
>
> ***
>
> (C) not later than 18 months after the end of such first regular [legislative] session, comply with [42 U.S.C. § 675(5)(E)] with respect to all of such children.

ASFA § 103(c). Section 103(c) does mandate that a state must comply with 42 U.S.C. § 675(5)(E) with respect to all children in foster care.

However, when examined in light of the structure of both that section of the ASFA and the Adoption Act as a whole, § 103(c) is ambiguous. Section 103(c)(4) provides that the requirements of § 103(c) "shall be treated as State plan requirements imposed by [42 U.S.C. § 671(a)]." Treating § 103(c) as a plan requirement means that the Secretary is to review compliance with the requirements of § 103(c) only for substantial compliance, not for compliance in every individual case. See 42 U.S.C. § 1320a-2a(a)(1)

(requiring Secretary to "promulgate regulations for the review of such programs [under Parts B and E of Title IV] to determine whether such programs are in substantial conformity with — State plan requirements under such parts B and E.") (emphasis added). The substantial conformity standard applicable to § 103(c) of the ASFA puts that provision on the same footing as 42 U.S.C. §§ 675(5)(D) and (E), and it prevents us from finding that the statute manifests an unambiguous congressional intent to create a right enforceable under § 1983.

Taken as a whole, §§ 675(5)(D) and (E) do not contain rights-creating language; they have an aggregate, not individual, focus. Those provisions do not give plaintiffs an "unambiguously conferred right to support a cause of action brought under § 1983." Gonzaga, 536 U.S. at 283, 122 S. Ct. at 2275. Congress has not spoken with a clear voice manifesting an unambiguous intent for those provisions of the Adoption Act to provide a basis for private enforcement. Id. at 280, 122 S. Ct. at 2273; Pennhurst, 451 U.S. at 17,28 & n.21, 101 S. Ct. at 1540, 1545 & n.21. Count IV of the complaint, therefore, does not state a claim upon which relief can be granted.

IV. YOUNGER ABSTENTION

Because some of the plaintiffs have standing to pursue the constitutional claims, we turn to the issue arising from the district court's dismissal of Counts I through III under the abstention doctrine of Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746 (1971). We review an abstention decision only for an abuse of discretion. Boyes v. Shell Oil Prods. Co., 199 F.3d 1260, 1265 (11th Cir. 2000).

The Supreme Court has said that federal courts have a "virtually unflagging obligation. . . to exercise the jurisdiction given them." Col. River Water Conservation Dist. v. United States, 424 U.S. 800, 817, 96 S. Ct. 1236, 1246 (1976). But "virtually" is not "absolutely," and in exceptional cases federal courts may and should withhold equitable relief to avoid interference with state proceedings. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 359, 109 S. Ct. 2506, 2513 (1989). While non-abstention remains the rule, the Younger exception is an important one. It derives from 'the vital consideration of comity between the state and national governments," Luckey v. Miller, 976 F.2d 673, 676 (11th Cir. 1992) ("Luckey"),[9] which Younger itself characterized as a "sensitivity to the legitimate interests of both State and National Governments," 401 U.S. at 44, 91 S. Ct. at 750.

Although Younger concerned state criminal proceedings, its principles are "fully applicable to noncriminal judicial proceedings when important state interests are involved." Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432, 102 S. Ct. 2515, 2521 (1982). "Proceedings necessary for the vindication of important state policies or for the functioning of the state judicial system. . . evidence the state's substantial interest in the litigation." Id. "Where vital state interests are involved, a federal court should abstain unless state law clearly bars the interposition of the constitutional claims." Id. (citation omitted). As the Middlesex Court framed the issue, "The question. . . is threefold: first, do [the proceedings] constitute

---

[9] The genealogy of the Luckey case is: Luckey v. Harris, 860 F.2d 1012 (11th Cir. 1988) ("Luckey I"); Luckey v. Harris, 896 F.2d 479 (11th Cir. 1989) ("Luckey II"); Harris v. Luckey, 918 F.2d 888 (11th Cir. 1990) ("Luckey III"); Luckey v. Miller, 929 F.2d 618 (11th Cir. 1991) ("Luckey IV") and Luckey v. Miller, 976 F.2d 673 (11th Cir. 1992) ("Luckey V").

an ongoing state judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges." Id. (emphasis omitted); see also Old Republic Union Ins. Co. v. Tillis Trucking Co., 124 F.3d 1258, 1261 (11th Cir. 1997).

The parties agree, and so do we, that the continuing state dependency proceedings involving each of the plaintiffs are ongoing state proceedings for the purposes of Middlesex analysis, see J.B. ex rel. Hart v. Valdez, 186 F.3d 1280, 1291 (10th Cir. 1999) (holding that continuing jurisdiction of juvenile court and six month periodic review hearings constituted an ongoing state judicial proceeding), although they dispute whether this federal proceeding, if allowed to go forward, would interfere with those state proceedings. The parties also agree, and so do we, that important state interests are involved. The parties disagree about whether the state court dependency proceedings provide the plaintiffs with an opportunity to raise and vindicate the federal constitutional claims, if those claims are valid. We will start by addressing whether the first Middlesex factor is properly read as requiring federal court interference with state proceedings and whether a federal court proceeding in this case would interfere with the dependency proceedings. Then we will address whether the plaintiffs have an adequate state remedy.

A. THE FIRST MIDDLESEX FACTOR

Both the plaintiffs and the defendants have presumed the first Middlesex factor, in addition to requiring an ongoing state proceeding, also requires that the federal relief the plaintiffs seek would interfere with those proceedings, and that if it would not interfere with the state proceedings, then the federal court has no basis for abstaining under Younger.

See generally, Middlesex, 457 U.S. at 431, 102 S. Ct. at 2521 ("Younger v. Harris. . . and its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances."). Decisions from some other circuits support that view. See. e.g., Green v. City of Tucson, 255 F.3d 1086, 1097 (9th Cir. 2001) (en banc) ("[T]he three part test we derived from Middlesex is a suitable guide for analysis only when the threshold condition for Younger abstention is present — that is, when the relief sought in federal court would in some manner directly 'interfere' with ongoing state judicial proceedings."); J.B., 186 F.3d at 1291 (stating first Middlesex factor as requiring abstention under Younger "when federal proceedings would. . . interfere with an ongoing state judicial proceeding"); FOCUS v. Allegheny County Court of Common Pleas, 75 F.3d 834, 843 (3d Cir. 1996) (stating first Middlesex factor as "there must be an ongoing state judicial proceeding to which the federal plaintiff is a party and with which the federal proceeding will interfere").

We have not yet expressly held that the first Middlesex factor requires that the federal proceeding interfere with the state proceeding, but implicitly we seem to have assumed as much. For example, in Old Republic, the plaintiff filed a declaratory judgment action in federal court to avoid paying a state court judgment and to have its obligations under certain insurance policies determined by a federal court instead of a state court. 124 F.3d at 1259. In applying the Middlesex factors, we concluded that the first factor was met, not simply because there was an ongoing state proceeding, but because that proceeding would have been effectively enjoined by a declaratory judgment issued by the federal court. Id. at 1261-62; see also For Your Eyes Alone. Inc. v. City of Columbus, 281 F.3d 1209, 1216 n.13 (11th Cir. 2002) ("[T]he Supreme Court has held that

Younger abstention is sometimes applicable to restrain federal court interference with certain noncriminal state proceedings that implicate important state interests."). Indeed, the Supreme Court in Middlesex held that "[because respondent.. . had an opportunity to raise and have timely decided by a competent state tribunal the federal issues involved, federal courts should abstain from interfering with the ongoing proceedings." 457 U.S. at 437, 102 S. Ct. at 2524 (emphasis added) (citation and internal quotation marks omitted). Therefore, we join our sister circuits in explicitly stating that an essential part of the first Middlesex factor in Younger abstention analysis is whether the federal proceeding will interfere with an ongoing state court proceeding. If there is no interference, then abstention is not required.

In order to decide whether the federal proceeding would interfere with the state proceeding, we look to the relief requested and the effect it would have on the state proceedings. See O'Shea v. Littleton, 414 U.S. 488,499-502, 94 S. Ct. 669, 677-79 (1974); Luckey V, 976 F.2d at 679 (Younger and O'Shea require "focus on the likely result of an attempt to enforce an order of the nature sought here"). The relief sought need not directly interfere with an ongoing proceeding or terminate an ongoing proceeding in order for Younger abstention to be required. In O'Shea, the Supreme Court held that abstention was required where an injunction would have "indirectly accomplish[ed] the kind of interference that Younger v. Harris. . . and related cases sought to prevent." Id. at 500, 94 S. Ct. at 678 (emphasis added). The plaintiffs in O'Shea did not seek to enjoin directly any pending prosecutions but apparently did seek a federal court injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials. The requested injunction contemplated interruption of the state proceedings in order

for the federal court to adjudicate compliance by the defendants with the injunction, through what the Supreme Court called "an ongoing federal audit of state criminal proceedings." Id. at 500, 94 S. Ct. at 678. The Court found that the injunction "would disrupt the normal course of proceedings in the state courts via resort to the federal suit for determination of the claim ab initio." Id. at 501, 94 S. Ct. at 679.

We applied the reasoning of O'Shea in Luckey V. 976 F.2d at 678-79. In that case, the plaintiffs had asserted a class action on behalf of "all individuals who are or will in the future be adversely affected by the unconstitutional practices of the indigent defense system within Georgia." Id. at 676. They sought injunctive relief to reform the indigent defense system, including orders that the system provide speedy appointment of counsel and ensure that there would be counsel at all probable cause determinations, and would have required monitoring the implementation of the injunction. Id. Adopting in full the explanation in the district court's abstention order, we concluded that the decree requested by the plaintiffs inevitably would interfere with state criminal proceedings. Id. at 677.

Luckey V did not involve a direct termination of ongoing state proceedings, and the plaintiffs did not directly contest any single criminal conviction or seek to restrain any individual prosecution. Nevertheless, as we observed, the injunctive relief the plaintiffs sought would have had the effect of restraining every indigent prosecution until the systemic improvements they wanted were in place. Id. We focused on the effect of the requested relief on the state proceedings. See id.; see also Joseph A. ex rel. Wolfe v. Ingram, 275 F.3d 1253, 1272 (10th Cir. 2002) ("Younger governs whenever the requested relief would interfere with the state court's ability to conduct proceedings, regardless of

whether the relief targets the conduct of a proceeding directly.") (citing News-Journal Corp. v. Foxman, 939 F.2d 1499, 1511 (11th Cir. 1991) (affirming district court's decision to abstain under Younger from hearing newspaper's challenge to state court's pre-trial order because an injunction would restrict the ability of the state court to impanel an impartial jury)).

Whether the effect of the federal court injunctive relief the plaintiffs seek in this lawsuit will interfere with ongoing state dependency proceedings depends in part upon the nature and extent of those proceedings. The state trial level courts of Florida play a critically important role in dependency hearings from the outset of a child's case. After the Department files a petition for dependency, the court holds an adjudicatory hearing as soon as practicable. Fla. Stat. § 39.507. If the facts alleged in the dependency petition are proven in the adjudicatory hearing and the child is determined to be dependent, the state court conducts a disposition hearing. Id. §§ 39.507(7); 39.52 1(1). The Department must prepare a written case plan and a predisposition study and file these items with the court no later than 72 hours before the disposition hearing. Id. § 39.52 1(1)(a).

The case plan is a document that "follows the child from the provision of voluntary services through any dependency, foster care, or termination of parental rights proceeding or related activity or process." Id. § 39.0 1(11). It must include, among other items, a description of the permanency goal for the child, a description of the type of home or institution in which the child is to be placed, a discussion of the safety and appropriateness of the child's placement, the services that the child needs and will receive, a description of the visitation rights of the parents, and a

description of the efforts to be undertaken to maintain the stability of the child's education. Id., § 39.601(3)(a)-(i).

The case plan must be approved by the court. Id. §§ 39.601(2), (3); 39.603. It may be amended if all the parties agree and the court approves, or after a hearing it may be amended by the court on its own motion or that of a party, based on competent evidence that demonstrates the need for an amendment. Id. § 39.601(9)(f). If at the hearing on the case plan, which occurs in conjunction with the disposition hearing, the court determines that any of the elements required in the plan are not present, it can order the Department to amend the plan to include what is necessary. Id. § 39.603(2).

The state court has continuing jurisdiction over a dependency case and reviews the child's status at least every six months. Id. § 39.701(1)(a). Prior to the review hearing, the Department must furnish to the court a written report that includes, among other items, a description of the placement of the child, its appropriateness, the safety of the child, the number of placements, documentation of the efforts of all parties to comply with the case plan, the number of times the child's educational placement has been changed, and copies of all medical and psychological records that support the terms of the case plan. Id. § 39.701(6)(a). At the review hearing, the court considers the child's situation, including whether there has been compliance with the case plan, the appropriateness of the child's current placement, and whether the child is in a setting that is family-like and consistent with the child's best interests and special needs. Id. § 39.701(7)(d), (g). No later than 12 months after the date that the child is placed in shelter care, the court must conduct a judicial review to plan for the child's permanent placement. Id. § 39.701(8)(f). If the child is not returned to his parents, the case plan must document steps the Department is taking

to find an adoptive parent or other permanent living arrangement for the child. Id.

If the Department has not complied with the case plan, the court may find it in contempt. Id. § 39.701(8)(c). The court can also issue protective orders. Id. § 39.701(8)(g). A protective order can require a person or agency to make periodic reports to the court containing such information as the court prescribes. Id. The court can issue a protective order in support of, or as a condition to, any other order it may make. Id.

The Tenth Circuit has addressed two cases similar to this one and held that abstention was required because the plaintiffs' federal proceeding would interfere with the state court proceedings by "fundamentally changing the dispositions and oversight of the children." J.B., 186 F.3d at 1291-92; see also Joseph A., 275 F.3d 1253. In J.B., the plaintiffs, mentally or developmentally disabled children in the custody of New Mexico, alleged violations of the Constitution and federal statutes and brought suit against several state officers in their official capacities, seeking declaratory and injunctive relief. The Tenth Circuit concluded that the relief requested would give the federal district court an oversight role over the entire state program for children with disabilities and would give it control over decisions then in the hands of the New Mexico Children's Court, such as whether to return a child to his parents or whether to modify a treatment plan. J.B., 186 F.3d at 1292.

In the other similar case decided by the Tenth Circuit, Joseph A., the plaintiffs, who were children in New Mexico's custody because of abuse or neglect, and the New Mexico Department of Human Services had entered into a federal court consent decree. 275 F.3d at 1259. When the plaintiff

children moved the court to hold the Department in contempt for allegedly violating the consent decree, the Department moved for dismissal based on Younger abstention. The Tenth Circuit held that federal court enforcement of certain provisions of the decree would interfere with the ongoing juvenile proceedings in the state court.[10] Id. at 1272. It concluded that "federal court oversight of state court operations, even if not framed as direct review of state court judgments, may nevertheless be problematic for Younger purposes," citing O'Shea and Luckey V. at 1271.

In this case, the plaintiffs are seeking relief that would interfere with the ongoing state dependency proceedings by placing decisions that are now in the hands of the state courts under the direction of the federal district court. The declaratory judgment and injunction that they request would interfere with the state proceedings in numerous ways. The federal and state courts could well differ, issuing conflicting orders about what is best for a particular plaintiff, such as whether a particular placement is safe or appropriate or whether sufficient efforts are being made to find an adoptive family. The federal court relief might effectively require an amendment to a child's case plan that the state court would not have approved, and state law gives its courts the responsibility for deciding upon such an amendment. See Fla. Stat. § 39.601(9)(f). Even though any remedial order would run against the Department, state law makes it a duty of state courts to decide whether to approve a case plan, and to monitor the plan to ensure it is followed. Id. § 39.701(1), (7)-(8). The plaintiffs seek to have the district court appoint a

---

[10] Some of the provisions that the Tenth Circuit cited as "[p]articularly problematic" under Younger included provisions governing assessment and treatment planning conferences for children entering the Department of Human Services' custody and periodic review of the Department's plans for those children. Joseph A., 275 F.3d at 1267-68.

panel and give it authority to implement a systemwide plan to revamp and reform dependency proceedings in Florida, as well as the appointment of a permanent children's advocate to oversee that plan. To say the least, taking the responsibility for a state's child dependency proceedings away from state courts and putting it under federal court control constitutes "federal court oversight of state court operations, even if not framed as direct review of state court judgments" that is problematic, calling for Younger abstention. Joseph A., 275 F.3d at 1271. The relief that the plaintiffs seek would interfere extensively with the ongoing state proceedings for each plaintiff.[11] The first Middlesex factor is satisfied.

B. THE THIRD MIDDLESEX FACTOR

As for the other Middlesex factor that is disputed, the third one, the plaintiffs have the burden of establishing that the state proceedings do not provide an adequate remedy for their federal claims. Butler v. Ala. Judicial Inquiry Comm'n, 261 F.3d 1154, 1159 (11th Cir. 2001). "Minimal respect for

---

[11] The plaintiffs argue that the requested relief would not interfere because it is directed solely at the Department of Children and Families and not the state courts. We previously rejected essentially that same argument in Luckey V, and we reject it again here. In that case, the plaintiffs sued the Governor of Georgia and all state court judges who presided over prosecutions of indigent defendants. 976 F.3d 673, 678. The plaintiffs contended that the relief they requested against the Governor of Georgia would not interfere with state court proceedings because the onus to comply would be on the state executive and not the judiciary. Id. We observed that "a case cannot be decided in a vacuum, and the potential enforcement difficulties of any order reforming such an integral aspect of a state criminal justice process as the indigent defense system would be significant." Id. at 679. This case raises the same concerns that Luckey V did, and the federal court relief the plaintiffs seek would interfere with the ongoing state dependency hearings, even if it were directed against the Department and state officers, instead of state courts and judges.

the state processes, of course, precludes any presumption that the state courts will not safeguard federal constitutional rights." Middlesex, 457 U.S. at 431, 102 S. Ct. at 2521. A federal court "should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." Pennzoil Co. v. Texaco. Inc., 481 U.S. 1, 15, 107 S. Ct. 1519, 1528 (1987). Plaintiffs, having failed to use their federal claims in the ongoing state proceedings involving them, must overcome this initial presumption by demonstrating that the state remedies are inadequate. Butler, 261 F.3d at 1159.

In determining whether the state remedies are adequate, as the district court correctly observed, "[t]he relevant question is not whether the state courts can do all that Plaintiffs wish they could, but whether the available remedies are sufficient to meet Pennzoil's requirement that the remedy be adequate." The district court found that "the juvenile court can act to protect children within its jurisdiction," citing Dep't of Children & Family Servs. v. I.C., 742 So. 2d 401, 404 (Fla. 4th DCA 1999), and declined to hold that the remedies available are inadequate. We agree with its conclusion.

A Florida state court can remedy in a dependency proceeding the harms that a child in the defendants' custody and in that court's jurisdiction might suffer. Although the Department has discretion regarding the identification of a specific placement for a child, State v. Brooke, 573 So. 2d 363, 368 (Fla. 1st DCA 1991), the court can order that siblings be placed together in foster care, one of the very things that some of these plaintiffs seek. See Div. of Family Servs. v. S.R., 328 So. 2d 270, 271 (Fla. 1st DCA 1976); F.B. v. State, 319 So. 2d 77, 79 (Fla. 1st DCA 1975). The court can order that a child be placed in a therapeutic setting, In the Interest of L.W., 615 So. 2d 834, 839 (Fla. 4th DCA

1993), and that a child be treated by a licensed health care professional or receive mental health treatment. Fla. Stat. § 39.407(4). While the state court cannot compel the Department to place children where space is not available, Dep't of Children & Family Servs. v. M.H., 830 So. 2d 849, 850 (Fla. 2d DCA 2002), it can hold the Department in contempt for failing to comply with a child's case plan and can order the Department to submit proposals for compliance. Fla. Stat. § 39.701(8)(c); L.W., 615 So. 2d at 837-38. Even though the court cannot prevent the Department from using unsafe or inappropriate facilities for all children, as to those children within its division, the court can take protective measures. It can determine whether a facility in which a child is located is safe, either by appointing a child's representative to make an inquiry or itself investigating conditions at the facility. Fla. Stat. § 39.701(8)(g); I.C., 742 So. 2d at 405. If the investigation reveals that a child within the jurisdiction of the court (meaning within its division) is in a dangerous facility, the court can take action, including finding the Department in contempt for failing to comply with the child's case plan. See generally, Fla. Stat. §§ 39.601(3)(e); 39.70l(8)(c); I.C., 742 So.2d at 404-06. Case plans always call for an appropriate placement, and an unsafe facility is not an appropriate one. Fla. Stat. § 39.60l(3)(e) ("placement is intended to be safe, the least restrictive and most family-like setting available consistent with the best interest and special needs of the child, and in as close proximity as possible to the child's home").

Again, the Tenth Circuit's decisions in similar cases are helpful. In J.B., that Court affirmed the district court's decision to abstain, because the plaintiffs had failed to show clearly that they could not have raised their claims in their periodic review hearings in the New Mexico Children's Court. 186 F.3d at 1292. The Court concluded that New

Mexico law "seemingly grants the Children's Court wide power to determine the needs and claims of children during the periodic review proceeding." Id. Additionally, because the Children's Court was a court of general jurisdiction and had full constitutional powers under New Mexico law, the plaintiffs had not provided the "unambiguous authority" that Pennzoil requires to prove that the state courts could not afford an adequate remedy. Id. at 1292-93.

In Joseph A., the Tenth Circuit held that a certified class of plaintiffs had not shown that the New Mexico Children's Court offered inadequate opportunities to raise federal constitutional and statutory claims. 275 F.3d at 1274. The plaintiffs in that case argued that the systemwide, structural relief they sought was not available in the Children's Court and cited a New Mexico decision, In re T.B., 913 P.2d 272 (N.M. App. 1996), for that proposition. The Tenth Circuit was not convinced the T.B. decision established the Children's Court was precluded from granting systemic relief. 275 F.3d at 1274 n.6. Although in T.B. the Children's Court had dismissed a motion brought under § 1983 to require the Department of Human Services "to submit an action plan for a system for the proper licensure and regulation of therapeutic foster care," the New Mexico Court of Appeals had addressed the dismissal only in dicta, noting that the guardian ad litem who had filed the motion had failed to identify which federal laws secured the rights the plaintiffs sought to enforce. Id. The Court held that the plaintiffs had not provided unambiguous authority that the relief they sought was unavailable. Id. at 1274.

In the present case, each of these plaintiffs is represented by counsel. There are no procedural constraints preventing them from presenting the claims in this case to the state courts in their dependency review hearings. They have not provided unambiguous authority establishing that the

procedures available in state court dependency proceedings do not provide an adequate opportunity for them to raise their constitutional claims. At dependency review proceedings for each plaintiff in this case, the state court will consider whether the parties have complied with the child's case plan, the appropriateness of that child's current facility placement, educational placement, and any special needs the child has. Fla. Stat. §§ 39.701(7)(d), (g). If the Department is not complying with the case plan for the child, the court can hold it in contempt. Id. §§ 39.701(8)(c), (g). If the plaintiff claims that he is in an unsafe and inappropriate placement, as we have already noted, the court can order the Department to comply with the case plan by putting him in a safe and appropriate place. Id. §§ 39.601(3)(e); 39.701(8)(c). If the plaintiff claims that he has been in foster care longer than reasonably necessary, the court can require the Department to document the steps that it is taking toward permanent placement. Id. §§ 39.701(f). If the plaintiff has not been placed with his siblings, the court can order them be placed together or it can require visitation between them. See Div. of Family Servs. v. S.R., 328 So. 2d 270, 271 (Fla. 1st DCA 1976).

The availability of these forms of relief and the existence of the state courts' protective order and contempt powers mean that the plaintiffs have not carried their burden of establishing that the ongoing state court proceedings do not provide an adequate opportunity to raise and vindicate each plaintiff child's individual claims.[12] Therefore, the third

---

[12] In LaShawn A. ex rel. Moore v. Kelly, 990 F.2d 1319, 1323-24 (D.C. Cir. 1993), the Court held that the District of Columbia's juvenile review proceedings did not provide the plaintiffs an adequate opportunity to raise their constitutional challenges. The plaintiffs in that case brought a class action on behalf of children who were in foster care under the supervision of the District of Columbia Department of Human Services, alleging widespread federal constitutional and statutory violations. The

and final Middlesex factor is satisfied. The district court did not abuse its discretion in abstaining under the Younger doctrine.

D.C. Circuit affirmed the district court's decision that Younger abstention was not warranted after noting that the state court had "explicitly rejected the use of review hearings to adjudge claims requesting broad-based injunctive relief based on federal law" in In re Brim, No. 489-80 (D.C. Super. Ct. July 20, 1984). In the Brim case the family court had denied a motion by two children for injunctive relief against the Department for its alleged mishandling of Social Security disability payments it had collected on the children's behalf and noted that the appropriate forum for such issues is federal court. LaShawn A., 990 F.2d at 1323. The D.C. Circuit therefore rejected Younger abstention because "there was no pending judicial proceeding in the District of Columbia which could have served as an adequate forum for the class of children in this case to present its multifaceted request for broad-based injunctive relief based on the Constitution and on federal and local statutory law." Id.

In contrast to the D.C. Circuit, however, in this circuit's Younger decisions, we have not determined whether the broad relief the plaintiffs would prefer is available but instead whether the forum itself is adequate for addressing the claims and providing a sufficient remedy to the individual plaintiffs. In the Luckey case, the plaintiffs sought broad-based injunctive relief to reform Georgia's indigent defense system. Luckey V, 976 F.2d at 676. Although we did not expressly address the third Middlesex factor in our opinion in that case, we did affirm the district court's decision to abstain under Younger. Id. at 679. The decision turned on the fact that the Luckey plaintiffs could have brought their challenges in their individual criminal trials, even though it is obvious that the broad-sweeping remedy they sought was unavailable there. "Equity need not intervene immediately in plaintiffs' state trials. Plaintiffs have an adequate remedy at law for any ineffective assistance of counsel they may actually receive Most important, they can present objections to sixth amendment violations at their state trials and in their state appeals." Luckey v. Harris, 896 F.2d 479, 482 (11th Cir. 1989) ("Luckey II") (Edmondson, J., dissenting).

V. CONCLUSION

Insofar as it relates to Larissa C. and Leanne G., the district court's judgment is VACATED and the case is REMANDED with instructions to dismiss that part of the amended complaint as moot. Insofar as it relates to Tanya M. and Elaine R., the district court's judgment is VACATED and the case is REMANDED with instructions to dismiss that part of the amended complaint for lack of standing. The district court's judgment is also VACATED as to those portions of the complaint for which the each of the seven remaining plaintiffs do not have standing, as discussed in Part II, and the case is REMANDED with instructions to dismiss those portions of the amended complaint for lack of standing. In all other respects, the district court's judgment is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 00-2116-CIV-MORENO

FOSTER CHILDREN BONNIE L., by and through her next friend Donald Hadsock, *et al.*,

Plaintiffs,

v.

JEB BUSH, as Governor of the State of Florida, *et al.*,

Defendants.

ORDER GRANTING IN PART DEFENDANTS' MOTIONS TO DISMISS

Plaintiffs filed this action for declaratory and injunctive relief relating to the operation of Florida's foster care system. The 116 page, 226 paragraph, six count Amended Complaint seeks relief pursuant to 42 U.S.C. § 1983 and is brought on behalf of Florida's 15,000 foster children. The suit challenges Defendants' pattern and practice of failing to fulfill their constitutional and statutory obligations toward the safety, stability, and health of the children, and deliberate indifference toward the alleged pattern and practice.

The Amended Complaint alleges violations of (l) substantive due process; (2) procedural due process; (3) the First, Ninth and Fourteenth Amendment rights to familial association; (4) violation of the federal Adoption and Safe Family Act; (5) violation of the Early Periodic Screening, Diagnosis and Treatment (EPSDT) provision of Medicaid; and (6) violation of rights under the Title VI financial assistance program. As of the time of the Amended Complaint, the Plaintiffs and putative class representatives included Bonnie L., age 17, Reggie and Rebecca B,, ages 13, Laurie and Lillie S., ages 10 and 8, Leslie F., age 17, Sandra M., age 16, Tanya M., age 14, Jay and Candice D., age 9 and 10, Matthew I., age 2, Hugh S., age 16, Leanne and Tammy G., ages 2 and 9, Elaine R., age 11, Paul B., age 16, Rachel C., age 13, Cathy W., age 12, Larissa C., age 2, John J., age 12, and Melinda and Karina, ages 18 and 17. The Amended Complaint gives an extensive account of each Plaintiff's experience in the foster care system; an account of each youth is more fully described in Magistrate Judge Dubé's Report and Recommendation of April 20, 2001. Defendants are Governor Jeb Bush, Judge Kathleen Kearney, Secretary of Department of Children and Family Services (the "Department" or "DCF"), and District Administrators Chuck Bates, John Awad, Ester Tibbs, Lee Johnson, Lynn Richard, Don Dixon, Robert Morin, Fran Gibbons, Paul Brown, Charles Auslander, Christine Davenport, Patrick Howard, Sue Gray, and Vern Martin.

All Defendants except Governor Bush filed a collective motion to dismiss (D.E. No. 93) asserting various grounds discussed more fully below. Governor Bush's motion to dismiss (D.E. No. 94) asserts the additional grounds that as alleged there is no basis for equitable relief against the Governor and there is no basis for liability under § 1983. All Defendants have supplemented arguments raised in their initial motion to dismiss by filing additional motions

to dismiss. These additional motions to dismiss seek to dismiss certain claims for lack of standing (D.E. No. 335), to dismiss certain named plaintiffs for mootness (D.E. No. 336), and to dismiss the action based on abstention and Eleventh Amendment grounds (D.E. No. 408).

Analysis

A. Eleventh Amendment Immunity

Defendants claim that this action should be barred on Eleventh Amendment Grounds. The Eleventh Amendment states, "The judicial powers of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The Amendment applies equally to suits against a state initiated by that state's own citizens. *Edelman v. Jordan*, 415 U.S. 651, 663, 94 S.Ct. 1347, 1356 (1974); *Summit Medical Assoc., P.C. v. Pryor*, 180 F.3d 1326, 1336 (11th Cir. 1999). There is a long recognized exception to this rule for suits against state officers seeking prospective equitable relief to end ongoing and continuous violations of federal law. *See Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 269, 117 S.Ct. 2028, 2034 (1997). Generally, the Eleventh Amendment does not bar the exercise of the judicial power where a plaintiff seeks to compel a state to comply with federal law. *Summit*, 180 F.3d at 1336.

A suit seeking prospective rather than retrospective relief is not barred so long as the prospective relief sought is not the functional equivalent of money damages. *Edelman*, 415 U.S. at 669, 94 S.Ct. at 1358. "In other words, a plaintiff

may not use the doctrine to adjudicate the legality of past conduct" *Summit*, 180 F.3d at 1337 (citing *Papasan v. Allian*, 478 U.S. 265, 277-78, 106 S.Ct. 2932, 2940(1986)). As stated in the Magistrate's Report and Recommendation, "In the present case, the Amended Complaint seeks a declaration that certain acts by the Defendants are unconstitutional and unlawful and asks the Court to enjoin such practices and take remedial action to ensure that the Defendants comply with all such laws in the future." *Foster Children v. Jeb Bush*, No.00-2116, slip op. at 20 (S.D. Fla. April 20,2001)(Magistrate Report & Recommendation). "An allegation of an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction." *Coeur d'Alene Tribe*, 521 U.S. 261, 281, 117 S.Ct. 2028, 2040.

The inquiry does not end there, however, as Defendants rely on *Coeur d'Alene* in support of its position that the Eleventh Amendment bars this Court from hearing this suit. Defendants contention is that state dependency courts are already addressing many of the issues raised in this suit, however, they fail to specify which aspects are being addressed. Defendants note that in *Coeur d'Alene* Justice Kennedy remarked, "A doctrine based on the inherent inadequacy of state forums would run counter to basic principles of federalism." *Id.* at 275, 117 S.Ct at 2037 (non-majority opinion). This portion of Justice Kennedy's opinion, found in part II. B., however, did not receive the support of five Justices and, therefore, is not part of the Supreme Court's holding. Nevertheless, there are two doctrines that merit examination and their relationship to the individual causes of action asserted in the instant suit, one from *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 117 S.Ct. 2028 (1997), the "special sovereign interests doctrine," and one from *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 116 S.Ct.

1114 (1996), involving the existence of a detailed remedial scheme.

1. *Coeur d'Alene*'s Special Sovereign Interests

The *Coeur d'Alene* Court limited the *Ex parte Young* doctrine when the equitable relief sought "implicates special sovereign interests." *Coeur d'Alene* Court, 521 U.S. 261, 281, 117 S.Ct. 2028, 2040. In that suit an Indian tribe sought declaratory and injunctive relief to resolve the tribe's right to quiet enjoyment over certain state lands. In finding that the Eleventh Amendment barred the action despite the fact that the suit sought only prospective injunctive relief, the Court held, "that if the Tribe were to prevail, Idaho's sovereign interest in its lands and waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury." *Id.* at 287, 117 S.Ct. at 2043.

Although no reported Eleventh Circuit case has analyzed in detail *Coeur d'Alene's* "special sovereign interests" requirement in a suit for prospective relief from the ongoing violation of federal laws and for reform of a state's system,[13] *Doe v. Chiles*, 136 F.3d 709 (11th Cir. 1998), decided after *Coeur d'Alene*, dealt with Eleventh Amendment immunity in a suit seeking prospective injunctive relief to enjoin violations of the Medicaid Act, 42 U.S.C. § 1396(a)(8). *Id.* at 711. The *Doe* court relied on *Tallahassee Mem. Reg. Med Ctr. v. Cook*, 109 F.3d 693 (11th Cir. 1997), a suit about the organizational and funding deficiencies in the state's medical assistance program, and held that "the instant lawsuit fits neatly within the *Ex parte Young* exception. Like the hospitals in *Cook*, the appellees in this case seek prospective injunctive relief to enjoin state

---

[13] *Summit Med. Assoc., P.A. v. Pryor*, 180 F.3d 1326 (11th Cir. 1999), was a suit challenging Alabama's partial-birth abortion act.

officials from continuing to violate federal law, that is, the Medicaid Act." Thus, the Eleventh Amendment did not bar the federal court from hearing that controversy.

The Tenth Circuit, meanwhile, has considered *Coeur d'Alene*'s impact in two suits closely analogous to the instant suit. In both cases the Tenth Circuit determined that administering a welfare program is not a "special sovereign interest," and looked to *Doe v. Chiles* from the Eleventh Circuit.

In *J.B. ex rel. Hart v. Valdez*, 186 F.3 d 1280 (10th Cir. 1999), plaintiffs sought prospective injunctive relief to reform the way the state was administering a welfare program in a putative class action involving mentally or developmentally disabled children in the custody of the state of New Mexico. After a thorough examination of Supreme Court precedent and *Coeur d'Alene*, the *Valdez* court held, "A state's interest in administering a welfare program at least partially funded by the federal government is not such a core sovereign interest as to preclude the application of *Ex parte Young*." *Valdez*, 186 F.3d at 1287 (citing *Doe v. Chiles*, 136 F.3d 709, 720 (11th Cir. 1998)).

The court in *Joseph A. v. Ingram*, 262 F.3d 1113 (10th Cir. 2001), used *Valdez* to reach an identical result in a suit seeking prospective injunctive relief for the Adoption and Safe Families Act of 1997 ("ASFA"), 42 U.S.C. § § 673b, 679b & 678, and the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 670 *et seq*. After noting that *Valdez* was squarely on point with its case, the *Joseph A.* court held, "Although we recognize that a state's administration of federally-funded welfare programs for children in its custody involves important state interests, those interests do not implicate the 'essential attribute[s] of

sovereignty' with which *Coeur d'Alene* was concerned. Therefore, we hold that *Coeur d'Alene* does not remove this action from the scope of the *Ex parte Young* doctrine." *Joseph A.*, 262 F.3d at 1120 (internal citations omitted).

Coeur d'Alene does not serve as a bar to Plaintiffs' EPSDT Medicaid Act count, *see Doe v. Chiles*, 136 F.3d 709, 720 (11th Cir. 1998), Plaintiffs' ASFA count, *see Joseph A. v. Ingram*, 262 F.3d 1113 (10th Cir. 2001), or the Title VI claims. *See Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999) *rev'd on other grounds sub nom. Alexander v. Sandoval*, 531 U.S. 1049, 121 S.Ct. 1511 (2001) (holding state waived sovereign immunity by receiving federal funds and that prospective injunctive relief is still available against director in his official capacity for continuing violations).

2. Detailed Remedial Scheme - *Seminole Tribe*

In *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 116 S.Ct. 1114 (1996), the Supreme Court established that the Eleventh Amendment bar, lifted by *Ex parte Young* for suits seeking prospective injunctive relief, should not be raised where Congress has created a detailed remedial scheme for the enforcement of a statutorily created right against a state. *Id.* at 74, 116 S.Ct. at 1132. The Court held:

> [T]he question is not whether a remedy should be created, but instead is whether the Eleventh Amendment bar should be lifted, as it was in *Ex parte Young*, in order to allow a suit against a state officer. Nevertheless, we think that the same general principle applies: Therefore, where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*.

Id. A key factor that a court must consider in applying *Seminole Tribe* is whether "Congress chose to impose upon the State a liability that is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young*." *Id.* at 76-77, 116 S.Ct. at 1133. Where such liability is limited by the remedial scheme created by Congress, it is a strong indication that Congress had no wish to allow for the application of *Ex parte Young*. *Id.* The *Seminole Tribe* Court ultimately determined that "*Ex parte Young* is inapplicable to petitioner's suit against the Governor of Florida, and therefore that suit is barred by the Eleventh Amendment and must be dismissed for a lack of jurisdiction." *Id.*

Defendants claim that the administrative remedy provided by EPSDT is a sufficient enforcement scheme to invoke *Seminole Tribe*. Defendants' contention is that Plaintiffs "must compel HHS - which can and must be sued in federal court - to find Florida out of compliance with federal law and to seek to withhold Florida's federal share of Medicaid payments." Def. Mot. to Dis. at 20-21.

In *Seminole Tribe*, the Court was confronted with the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d). The Court concluded after examining the statutory scheme that Congress intended the provisions of § 2710(d)(3)[14] to be enforced in an action brought under § 2710(d)(7). Section 2710(d)(7) confers jurisdiction on federal district courts to hear a controversy between the Indian tribe and the State with whom the negotiations on the compact are required under § 2710(d)(3), and serves to limit the relief that can be administered. Section 2710(d)(7) allows the Indian tribe itself

---

[14] Section 2710(d)(3) "imposes upon the States a duty to negotiate in good faith with an Indian tribe toward the formation of a compact" concerning gaming activities. *Seminole Tribe*, 517 U.S. at 1119, 116 S.Ct. at 47.

to initiate the suit and take advantage of the statutory remedial scheme that the Court determined prevented the application of *Ex parte Young*. *See* 25 U.S.C. § 2710(d)(7) ("An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A)."). In other words the aggrieved party is provided with a detailed mechanism with which it can seek to enforce its rights.

Defendants point to the administrative remedy available in 42 C.F.R. § 430.38.[15] This remedy when coupled with the scheme provided in 42 U.S.C. § 1396c[16] permits the

---

[15] 42 C.F.R. § 430.38 deals with judicial review and holds:

> (a) Right to judicial review. Any State dissatisfied with the Administrator's final determination on approvability of plan material (§ 430.18) or compliance with Federal requirements (§ 430.35) has a right to judicial review.
> (b) Petition for review.
> (1) The State must file a petition for review with the U.S. Court of Appeals for the circuit in which the State is located, within 60 days after it is notified of the determination.

The determination of the circuit court is reviewed by the United States Supreme Court. 42 C.F.R. § 438(e).

[16] 42 U.S.C. 1396c holds:

> If the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of the State plan approved under this subchapter, finds—
> (1) that the plan has been so changed that it no longer complies with the provisions of section 1396a of this title; or
> (2) that in the administration of the plan there is a failure to comply substantially with any such provision;
> the Secretary shall notify such State agency that further payments will not be made to the State (or, in his discretion, that payments will be limited to categories under or parts of the State plan not affected by such failure), until the Secretary is satisfied

state to sue the Secretary of HHS. Defendants assert that this is sufficiently analogous to *Seminole Tribe*. A significant difference between the scheme under the Indian Gaming Regulatory Act and Medicaid is that in the former, the aggrieved entity can bring an action as provided by the statute on its own behalf, while under Medicaid, the aggrieved individual is unable to assert his own rights but must rely on a third party to champion his cause. Medicaid also differs from the statute in *Seminole Tribe* in that it does not provide a mediation process, an administrative process, or impose a particular burden of proof. Numerous courts have similarly found § 2710(d)(7)'s remedial scheme disanalogous. *See e.g., Telespectrum, Inc. v. Public Service Com'n of Kentucky*, 227 F.3d 414,420(6th Cir. 2000) ("Unlike the statutory scheme at issue in *Seminole Tribe*, section 332(c)(7)(B) does not provide for either a 'detailed' or an 'intricate' regulatory scheme. The section provides only that action may be maintained in 'any court of competent jurisdiction,' but does not provide for a mediation process, mandate negotiations, impose a shifting burden of proof, or permit the promulgation of regulations by a federal official to resolve a specific dispute."); *MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, 222 F.3d 323, 347 (7th Cir. 2000) ("Unlike the IGRA, in which 'Congress chose to impose upon the State a liability that is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young,' Seminole Tribe*, 517 U.S. at 75-76, 116 S.Ct. 1114, Congress has not limited the court's remedial power under subsection 252(e)(6) of the 1996 Telecommunications Act."). Furthermore, in both *Doe v. Chiles*, 136 F.3d 709 (11th Cir. 1998) and *Tallahassee Mem. Reg. Med. Ctr. v. Cook*, 109 F.3d 693 (11th Cir. 1997), post

---

that there will no longer be any such failure to comply. Until he is so satisfied he shall make no further payments to such State (or shall limit payments to categories under or parts of the State plan not affected by such failure).

Seminole Tribe cases, the Eleventh Circuit reviewed the relationship of the Eleventh Amendment to Medicaid and failed to hold that statute contained "detailed remedial schemes" that would bar the applicability of *Ex parte Young*. Similarly, *Seminole Tribe* does not present an Eleventh Amendment problem for Title VI, 42 U.S.C. § 2000d. *See Sandoval*, 197 F.3d at 494 ("Therefore, we can find no constitutional defect inherent in the explicit state immunity waiver enacted pursuant to the Spending Clause in Section 2000d-7.").

The scheme in the Adoption and Safe Families Act, 42 U.S.C. §§ 671 *et seq.*, presents a different scenario and dictates a different result. Although Defendants did not raise a defense based on *Seminole Tribe* in connection with the remedial scheme devised in connection with that statute, this Court considers the applicability of *Seminole Tribe* in light of *Joseph A.*, 262 F.3d 1113, recently decided by the Tenth Circuit.

The *Joseph A.* court was confronted with a suit involving children committed to the custody of the Youth and Families Department of New Mexico. One of the claims at issue was a claim involving ASFA and the Adoption Assistance and Child Welfare Act. The Tenth Circuit applied *Seminole Tribe* and held as follows:

> Title IV was amended in 1997 to include the Adoption and Safe Families Act. The ASFA conditioned the receipt of certain federal funds on a state's adherence to a comprehensive set of statutory and regulatory standards imposing federally-defined objectives and administrative procedures for states' child welfare services, see 42 U.S.C. §§ 671 *et seq.*; 45 C.F.R. §§ 1355.21(b) & 1355.30, the contents of individual case plans for children participating in the

programs, see 42 U.S.C. §§ 671(a)(16) & 675(1), and appeals of award decisions, *see* 45 C.F.R. § 1355.30; 45 C.F.R. Part 16. The regulations issued to implement the ASFA require that states conduct periodic self-evaluations of their compliance with these requirements, *see id.* § 1355.32, and to submit to federal administrative oversight by the Department of Health and Human Services "HHS"), *see generally id.* §§ 1355.32-1355.34. States whose child welfare services are found not to be in substantial conformity with the federal requirements are required to develop a program improvement plan identifying action steps required to bring the service into conformity and benchmarks against which progress is to be measured. *See id.* § 1355.35. Should HHS disagree with the contents of a mandatory program improvement plan and be unable to reach a consensus with the state involved, HHS retains the authority to dictate the terms of the improvement plan. *See id.* § 1355.35(2). States that fail to come into substantial compliance with the ASFA's planning requirements face a graduated series of reductions in their funding eligibility under the act. *See id.* § 1355.36(b)-(e).

Turning to Title XX of the Social Security Act, we find a comparably detailed remedial scheme set forth within the accompanying regulations. *See* 45 C.F.R. §§ 96.50 *et seq.* The regulations require parties who wish to assert that a state has misapplied funds provided in a block grant to submit a complaint to specified officials within HHS and to comply with a detailed set of procedures for administrative hearings and appeals. *See Id.* §§ 96.50(b)-(e), 96.51, 96.52. When funds provided through a block grant are inappropriately allocated by a state, the proper remedy is for the state to repay the hinds to HHS, or, if repayment is not forthcoming, for HHS to reduce

> the following year's block grant by a commensurate amount. *See id.* § 96.51(a)-(b).
>
> We find the comprehensive statutory and regulatory provisions governing Titles IV and XX demonstrate that Congress meant to preclude reliance on the broad provisions of an *Ex parte Young* suit to enforce the federal statutory standards governing state child adoption and welfare services. *Cf. Westside Mothers v. Haveman*, 133 F. Supp.2d 549, 574-75 (E.D. Mich.2001) (applying *Seminole Tribe* to preclude *Ex parte Young*)) action under federal Medicaid statute where statute authorized secretary of Health and Human Services to withdraw federal funding from non-compliant states). We therefore hold that those portions of the injunction that are intended to enforce rights created by Title IV of the Social Security Act are not amenable to enforcement pursuant to the *Ex parte Young* doctrine, and thus we must reverse in part the district court's conclusion that this action is not barred by the Eleventh Amendment.

Joseph A., 262 F.3d at 1122-23 (footnotes omitted). The regulations passed pursuant to ASFA allow an individual to present a claim to an administrator. Under *Seminole Tribe* such an alternative scheme prevents *Ex parte Young* from lifting the bar imposed by the Eleventh Amendment.

In sum, the Medicaid Act claim is not barred from the ambit of *Ex parte Young*. Following the Tenth Circuit's decision in *Joseph A.*, the ASFA claim is, however, barred by the Eleventh Amendment under *Seminole Tribe*. Therefore, Plaintiffs' claim dealing with the Adoption and Safe Families Act (Count 4) is DISMISSED.

B. *Younger* Abstention

Abstention from the exercise of federal jurisdiction is the exception and not the rule. *Colorado River Water Conservation Dist. v. US.*, 424 U.S. 800, 817, 96 S.Ct. 1236, 1246 (1976); *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 359, 109 S.Ct. 2506, 2513 (1989) ("*NOPSI*"). As the Supreme Court held in *NOPSI*, "Our cases have long supported the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." *Id.* at 358, 109 S.Ct. at 2513.

There are, however, some "classes of cases in which the withholding of authorized equitable relief because of undue interference with state proceedings is the 'normal thing to do.'" *NOPSI*, 491 U.S. at 359, 109 S.Ct. at 2513. The genesis of the *Younger* abstention doctrine came in the case bearing its name which involved a facial First Amendment based challenge to a California criminal law. In *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746 (1971), the Court held that a federal court should not enjoin pending state criminal proceedings and, therefore, should abstain from hearing the suit. The doctrine has not been limited solely to the criminal context; the Court subsequently has expanded the protection of *Younger* to "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *NOPSI*, 491 U.S. at 367-68, 109 S.Ct. at 2518 (citing *Juidice v. Vail*, 430 U.S. 327, 336, n. 12, 97 S.Ct. 1211, 1217, n. 12(1977) (civil contempt order); *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 13, 107 S.Ct. 1519, 1527 (1987) (requirement for the posting of bond pending appeal)).

The factors for determining whether a federal court should abstain were expressed in *Middlesex County Ethics*

Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432, 102 S.Ct. 2515, 2521 (1982):

> The question ... is threefold: first, do state bar disciplinary hearings within the constitutionally prescribed jurisdiction of the State Supreme Court constitute an ongoing state judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges.

Naturally, this standard has formed the basis for analyzing *Younger* abstention issues in the Eleventh Circuit. *See e.g., Old Republic Union Ins. Co v. Tillis Trucking Co., Inc.*, 124 F.3d 1258, 1261 (11th Cir. 1997); *Butler v. The Alabama Judicial Inquiry Comm.*, 245 F.3d 1257, 1262 (11th Cir. 2001), *answer to certified question conformed* 261 F.3d 1154 (11th Cir. 2001). A requirement implicit in the *Middlesex* test is that the federal relief sought would actually interfere with the ongoing state judicial proceeding. *See Green v. City of Tucson*, 255 F.3d 1086, 1097 (9th Cir. 2001) (en banc) ("[The three-part test we derived from *Middlesex* is a suitable guide for analysis only when the threshold condition of the *Younger* abstention is present - that is, when the relief sought in federal court would in some manner directly 'interfere' with ongoing state judicial proceedings.")[17]

---

[17] This requirement was easily met in *Middlesex*, *Butler*, and *Old Republic*, all of which held the *Younger* abstention was applicable and thus barred the federal court from hearing the suit. The *Middlesex* plaintiffs sought to prevent a state bar disciplinary procedure from proceeding against them by challenging the disciplinary rules allegedly violated on First Amendment grounds. *Middlesex*, 457 U.S. at 428, 102 S.Ct. at 2519-20; *see also Green*, 255 F.3d at 1095 ("There was no doubt ... that the plaintiffs in *Middlesex* were seeking to 'interfere' quite directly

In suits for prospective injunctive relief, courts have been troubled by the specter of an ongoing scrutiny of state judicial proceedings even those that are not yet pending and of having to enforce a federal injunction against state judicial officers. In *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669 (1974), a class action was brought against Illinois magistrate and circuit court judges for allegedly administering the criminal justice system — particularly the setting of bail — in a manner violative of the Constitution. *Id.* at 490, 94 S.Ct. at 673. Plaintiffs sought an injunction preventing the occurrence of specific events that might take place in future state criminal trials. *Id.* at 500, 94 S.Ct. at 678. The Supreme Court determined that a system of periodic reporting would constitute "an ongoing federal audit of state criminal proceedings," that *Younger* seeks to prevent and "is antipathetic to established principles of comity." *Id.* at 500-01, 94 S.Ct. at 678-79. The *O'Shea* Court was troubled that an injunction would "necessarily impose continuing obligations of compliance" on the respondents, the state judicial officers, and questioned "how compliance might be enforced if the beneficiaries of the injunction were to charge that it had been disobeyed." *Id.*

---

with the pending, state-instigated disciplinary proceedings, for they were asking the federal court to enjoin those enforcement proceedings.... The three factors that became our *Younger* standard first appeared as the *Middlesex* Court's summary of three *other* issues pertaining to *Younger* that *were* in dispute in the case."). Similarly, the plaintiff in *Butler* sought to enjoin ethics disciplinary proceedings by challenging the applicable rule's constitutional validity. *Butler*, 261 F.3d at 1156. In *Old Republic*, the plaintiffs filed for declaratory relief to avoid having to pay a state court judgment and to have its obligations determined by a federal court rather than a state court. *Old Republic*, 124 F.3d at 1259-60.

In *Luckey v. Miller*, 976 F.2d 673, 676 (11th Cir. 1992) ("*Luckey V*")[18], a suit factually rather analogous to the instant suit, the plaintiffs asserted a class action on behalf of "all individuals who are or will in the future be adversely affected by the unconstitutional practices of the indigent defense system within Georgia." In that suit for prospective injunctive relief, the plaintiffs sought relief for indigent defendants at various pretrial stages, uniform standards for the representation of criminal defendants, and monitoring of those standards. *See Luckey V*, 976 F.2d at 676. Similar to the Court in *O'Shea*, the *Luckey V* court was troubled with enforcement of any injunction that a federal court could issue. The *Luckey V* court expressed its concern by quoting Judge Edmonson's dissent in *Luckey v. Harris*, 896 F.2d 479, 482 (11th Cir. 1989) ("*Luckey V*") (Edmonson, J., dissenting), wherein he wrote, "If a state court judge does not obey a district court's injunction, are we willing to jail the state court judge for contempt? Avoidance of this unseemly conflict between state and federal judges is one reason for *O'Shea* and *Younger*." The *Luckey V* court reasoned that plaintiffs intended "to restrain every indigent prosecution and contest every indigent conviction until the systemic improvements they seek are in place." *Luckey V*, 976 F.2d at 677 In discussing *Luckey V*, the Eleventh Circuit held that where the effect of an injunction would inevitably interfere with future state proceedings, *Younger* does not only bar federal courts from restraining ongoing state court prosecutions, it can bar suits for "prospective relief involving cases that are not yet pending." *Pompey v. Broward County*, 95 F.3d 1543, 1547-48 (11th Cir. 1996) (citing *Luckey V*, 976 F.2d at 677-78).

---

[18] The controversy in *Luckey* spawned five sets of opinions. The one discussed is referred to as *Luckey V* wherein the Eleventh Circuit summarily affirmed the district court's order that tracked Judge Edmonson's dissent in *Luckey v. Harris*, 896 F.2d 479 (11th Cir. 1989) ("*Luckey II*").

Luckey V, however, does not foreclose all suits for prospective injunctive relief as it found distinguishable an unreported prospective injunctive relief case out of the Middle District of Alabama, *R.C. v. Hornsby*, no. 88-d-1 170-n (M.D. Ala. April 19, 1989). *R.C.* sought relief to alleviate systemic constitutional violations in the foster care system for emotionally disturbed children. The *Luckey V* court held that the cause before it was disanalogous to *R.C.* as the *R.C.* district court had found that there was no state proceeding to be interfered with and the state's juvenile court lacked authority to consider the issues raised in the complaint. *Luckey V*, 976 F.2d at 677.

This Court must make the same determination as the *R.C.* and *Luckey V* courts. Thus, this Court examines the claims of the Plaintiffs in the instant case. Plaintiffs contend that they do not endeavor to stop any judicial proceedings or restrain any judicial officer. Their prayer for relief essentially includes:

1) certifying this action as a class;
2) declaring unconstitutional and unlawful practices violative of the Constitutional provisions and statutory provisions as set forth in the six count complaint including meeting the putative class members' basic needs, safety, freedom from harm and unreasonable restraints on liberty;
3) enjoining the Defendants from violating the Constitution and the laws;
4) appointing an expert panel to develop and oversee the implementation of a plan for reform;
5) appointing a children's advocate to present the interests of Plaintiffs to the department and with whom state decision-makers will meet

"regularly and frequently to attempt to resolve issues that affect individual or groups of similarly situated foster children;"

6) award of attorneys' fees and other relief as the Court sees fit.

See Am. Compl. at p.110-13. Plaintiffs argue that none of the relief sought will interfere in a state court's decision-making concerning any child; they assert that they seek relief against the Department only.

Defendants counter by claiming that any action this Court takes will impermissibly affect state circuit court proceedings pursuant to Florida Statute Chapter 39, Proceedings Related to Children. As the allegations in the Amended Complaint and the Prayer for Relief do not have so obvious an effect on the state courts as in *O'Shea* and *Luckey V*, this Court must examine the jurisdiction and reach of the state dependency court and determine whether the relief sought in this case would result in the type of impermissible conflict that the *Younger* doctrine is designed to prevent.

After the petition for dependency made by the Department pursuant to Fla. Stat. § 39.521 (2001), the circuit court holds a disposition hearing if the court finds the facts alleged in the petition were proven by a preponderance of the evidence in an adjudicatory hearing. Fla. Stat. § 39.507 (2001). At the disposition hearing, the Department must prepare a written case plan and predisposition study. Fla. Stat. § 39.521(1). The case plan must be filed with the court, Fla. Stat § 39.601(2) (2001), and the plan must be approved by the court or the court must set a hearing within thirty days of the disposition hearing to review and approve the case plan. Fla. Stat. § 39.521(1)(a).

The requirements of a case plan are set forth in Fla. Stat. § 39.601 (2001). In essence the case plan must be reasonable and accessible to the parent, any court appointed guardian *ad litem*, and where appropriate, the child. Fla. Stat. § 39.601(l). The case plan must set forth the number of meetings per month between the Department and the parent and must be subject to modification for changing circumstances. *Id.* The plan must describe the problems, and how the parent can comply with the plan under measurable objectives to address the problems. Fla. Stat. § 39.601(2). The case plan filed before the court *inter alia* must include a permanency goal, the description of the home or institution in which the child is to be placed, the financial obligations of the parent, the parent's visitation rights, the safety and appropriateness of the placement, and the stability of the educational process. Fla. Stat. § 39.601(3). Once the case plan has been approved by the court, the court retains jurisdiction, and the plan subject to judicial review at least every six months. Fla. Stat. § 39.701(1) (2001).

Heeding this statutory scheme, Plaintiffs assert that they seek to affect those matters beyond the reach of the state dependency courts. In terms of the three *Middlesex* factors, Plaintiffs concede that the second *Middlesex* factor, whether an important state interest is implicated, is met given importance of administering the state dependency proceedings. Each group of claims, therefore, will be examined in terms of the first *Middlesex* prong, whether there is an ongoing state judicial proceeding, and the third prong, whether is there an adequate opportunity in the state proceedings to raise the claims.

Plaintiffs' claims revolve around the limitations of the juvenile court. These include the juvenile court's inability to select specific placements, to order specific treatments or services, to order the creation of certain services, to reject an

unsafe placements, to remove a child from an unsafe placement without discharging the child from the Department's custody or order a different level of placement, to enjoin injurious practices of the Department, to require the Department to produce a better array of placement options, to affect the management of the Department's resources, and Plaintiffs' inability to bring a class action complaint before the juvenile court. Plaintiffs also claim that the jurisdiction of the juvenile courts does not extend to individuals in extended foster care pursuant to Fla. Stat. § 409.145 (2001), and that the juvenile courts are unable to mandate compliance with federal statutory and to prevent the violation of constitutional rights. As grounds Plaintiffs cite to *Dep't. of Children and Family Services v. I.C.*, 742 So.2d 401, 404 (Fla. 4th DCA 13999), where the court held, "The court cannot 'micro manage' a facility operated by DCF.... Nor can the court order DCF to provide specific treatment or placement of a child." *See also In the Interest of L.W.*, 615 So.2d 834, 838 (Fla. 4th DCA 1993) (dependency court had no ability to order specific placement); *State ex rel. Dep't. of Health and Rehabilitative Servs. v. Brooke*, 573 So.2d 363 (Fla. 1st DCA 1991) (holding same).

Excepting for the time being those individuals in extended foster care, there is no dispute that the state dependency court has continuing jurisdiction over dependent children conferred by Fla. Stat. § 39.701. A dependent child is under the jurisdiction of the dependency court from the moment the Department petitions for dependency (and would become a putative class member) until the child is deemed to be no longer dependent. *See* Am. Compl. ¶ 117 ("The class consists of all children who are currently or will be in the custody of Defendants as an alleged or adjudicated dependent child.").

The state court obtains jurisdiction in the disposition hearing, must approve a case plan, and thereafter retains jurisdiction and conducts periodic judicial review once the case plan has been approved by the court. Fla. Stat. §§ 39.507, 39.521 & 39.701(1); *see also In the Interest of L.W.*, 615 So.2d at 838 ("In [dependency] proceedings ..., there is a continuing statutory duty of judicial review."); *Henry & Rilla White Foundation, Inc. v. Migdal*, 720 So.2d 568, 571-72 (Fla. 4th DCA 1998) (holding same). At such point the actions of the Department are before the state circuit court for review. There is no point in this process where actions of the Department concerning any child are beyond the review of the state court. Any order of this Court, therefore, has the potential for an unseemly conflict between a state judge and this Federal Court. *See Luckey V*, 976 F.2d at 671; *c.f. J.P. v. DeSanti*, 653 F.2d 1080, 1084 (6th Cir. 1981) (it was error under *Younger* to enjoin the use of social histories prepared by state probation authorities for juvenile adjudicatory hearings); *Joseph A. v. Ingram*, 262 F.3d 1113, 1126 (10th Cir. 2001) (prohibiting on *Younger* grounds the enforcement of the settlement agreement likened to an injunction as it required interference with the operations of the juvenile court by preventing the child services department from recommending a range of planning options for children who are in the department's custody). In light of the continuing jurisdiction conferred by Fla. Stat. §39.701, Plaintiffs cannot argue that the first *Middlesex* prong requiring an ongoing state judicial proceeding is not met due to the retention of jurisdiction and periodic judicial review once the case plan has been approved by the court. Fla. Stat. § 39.701(1); *see also In the Interest of L.W.*, 615 So.2d at 838 ("In [dependency] proceedings ..., there is a continuing statutory duty of judicial review."); *Henry & Rilla White Foundation, Inc. v. Migdal*, 720 So.2d 568, 571-72 (Fla. 4th D.C.A. 1998) (holding same).

All complaints concerning Chapter 39 alleged or adjudicated dependent children, therefore, rise and fall on the third *Middlesex* prong, whether there is an adequate opportunity to raise their claims in the state proceedings. *Middlesex*, 457 U.S. at 432, 102 S.Ct. at 2521. The plaintiff bears the burden to establish that state procedures are inadequate. *Butler v. Alabama Judicial Inquiry Comm.*, 261 F.3d 1154, 1159 (11th Cir. 2001) ("*Butler II*"). "Minimal respect for the state processes, of course, precludes any presumption that the state courts will not safeguard federal constitutional rights." *Middlesex*, 457 U.S. at 431, 102 S. Ct. at 2521. The burden "rests on the federal plaintiff to show that state procedural law barred presentation of [its] claims." *Pennzoil v. Texaco. Inc.*, 481 U.S. 1, 14, 107 S.Ct. 1519, 1528 (1987) (citations omitted). The *Pennzoil* Court determined:

> We cannot assume that state judges will interpret ambiguities in state procedural law to bar presentation of federal claims. Accordingly, when a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy in the absence of unambiguous authority to the contrary.

Pennzoil, 481 U.S. at 15, 107 S.Ct. at 1519 (internal citations omitted). Plaintiffs have produced no authority that explicitly states that the constitutional and the federal statutory claims cannot be raised before a dependency court. This Court, therefore, must examine the decisions of Florida's courts to determine whether it is unambiguous that the dependency court's authority does not include the ability to review the claims raised and afford an adequate remedy.

Both groups of litigants look largely to the same decisions from Florida's appellate courts in support of their arguments. In a suit over whether the state circuit judge in a dependency proceeding could order "a child permanently committed to HRS for adoption placement to be cared for in a therapeutic foster home or residential facility," Florida's Fourth District Court of Appeals examined in detail Florida's statutory scheme for dependency matters. *In the Interest of L.W.*, 615 So.2d at 835. The court began its analysis by quoting from § 39.001(2)(a) & (b) stating, "The Florida Juvenile Justice Act begins with the recitation of the legislative purposes which include: (a) To provide judicial and other procedures through which children and other interested parties are assured fair hearings and the recognition, *protection*, and *enforcement* of their constitutional and other legal rights...." *In the Interest of L.W.*, 615 So.2d at 837 (emphasis in original); *see also A.G. v. Dep't. of Children and Families*, 721 So.2d 414, 417 (Fla. 4th DCA 1998) (appellate court reversed dependency court for denying due process rights of litigants); *I.C.*, 742 So.2d 405-6 (holding same). *In the Interest of L.W.* also determined, "we must conclude that the purpose of judicial review is to assure that the Department is complying with reasonable efforts to assure the protection of this child and to promote her adoptive placement as is the Department's duty." *Id.* at 838; *see also Henry & Rilla White Foundation, Inc.*, 720 So.2d at 573 ("The provisions of Chapter 39 provide a juvenile court judge the flexibility to factor a child's safety into a custody decision at all stages of a juvenile proceeding."). Far from being the unambiguous authority that is required of Plaintiffs, these cases rather clearly indicate that the federal constitutional claims relating to both the issue of child safety and due process can be raised in the dependency court hearing.

Plaintiffs are correct in asserting that the specific remedies they seek such as the inability of the juvenile court to select specific placements, order specific treatments, services, or the creation of certain services, to reject unsafe placements, and review of the budget choices of the Department are not available in the state circuit court. *See I.C.*, 742 So.2d at 404; *In the Interest of L.W.*, 615 So.2d at 838; *State ex rel. Dep't. of Health & Rehabilitative Servs.*, 573 So.2d at 363. The relevant question is not whether the state courts can do all that Plaintiffs wish they could, but whether the available remedies are sufficient to meet *Pennzoil's* requirement that the remedy be adequate. *See Pennzoil*, 481 U.S. at 15, 107 S.Ct. at 1519.

Despite the limitations Plaintiffs describe, the *I.C.* court – perhaps Plaintiffs' strongest case – determined that "the juvenile court can act to protect children within its jurisdiction." *I.C.*, 742 So.2d at 404. The *I.C.* court looked to § 39.453(8)(g), which holds:

> The court may issue a protective order in assistance, or as a condition, of any other order made under this part. In addition to the requirements included in the case plan, the protective order may set forth requirements relating to reasonable conditions of behavior to be observed for a specified period of time by a person or agency who is before the court; and such order may require any such person or agency to make periodic reports to the court containing such information as the court in its discretion may prescribe.

See also Henry & Rilla, 720 So.2d at 573 (holding that Chapter 39 provides the juvenile judge the flexibility to

factor a child's safety into a custody decision at all stages of a juvenile proceeding). Although Plaintiffs and their counsel, if they had designed the statutory scheme, may have chosen to vest the dependency court with the ability to more precisely manage each child before it, this Court declines to hold that the allowable remedies are inadequate. The legislature and the courts of Florida have clearly determined that the system in place leaves to the Department decisions which are properly its. *See I.C.*, 742 So.2d at 404-5. Holding otherwise would be antipathetic to established principles of comity. *O'Shea*, 414 U.S. at 501, 94 S.Ct. at 679.

The next question, therefore, is whether the lack of a class mechanism renders the dependency court inadequate for *Younger* purposes. Plaintiffs rely on *LaShawn A. v. Kelly*, 990 F.2d 1319 (D.C. Cir. 1993), where the court determined that there was no pending judicial proceeding "which could have served as an adequate forum for the class of children in this case to present its multifaceted request for broad-based injunctive relief based on the Constitution and on federal and local statutory law." *Id.* at 1324. In *LaShawn A.*, however, after the court conducted an extensive review over the jurisdiction of the juvenile courts in the foster care setting, the court concluded that the state court "explicitly rejected the use of review hearings to adjudge claims requesting broad-based injunctive relief based on federal law." *Id.* at 1323. Although Florida's dependency courts similarly are not permitted to entertain a class action, *see I.C.*, 742 So.2d at 405-6, unlike the plaintiffs in *LaShawn A.*, there is no bar to Plaintiffs bringing constitutional claims. The issue that remains, therefore, is whether the lack of a class action mechanism renders the dependency proceedings inadequate.

In *Luckey V*, although the court did not explicitly discuss the lack of a class action mechanism in the state proceeding, nevertheless, the apparent deficiency did not

prevent the court from abstaining under *Younger*. *Luckey V*, 976 F.2d at 677. In Pompey, also a class action case, the court determined that abstention under *Younger* was appropriate because plaintiffs could have raised their claims during their contempt hearings, on appeal, or through *habeas corpus* relief. *Pompey*, 95 F.3d at 1551. The *Pompey* court found no procedural bar even though the state proceedings did not include a class mechanism. *Id.* in light of *Luckey V's* wariness to enter an injunction that would inevitably interfere with both ongoing and future state court procedures, it would be inappropriate to adjudicate the constitutional issues on a class wide basis in this forum and reach one result and then have a dependency court reach a contrary finding after examining the situation of a dependent youth on an individual basis. This is exactly the scenario that troubled the *Pompey* court and caused it to state, "Federal 'inferior courts' have no more business issuing supervisory injunctions to safeguard federal constitutional rights in state court proceedings than state courts have issuing such injunctions to safeguard federal constitutional rights in federal court proceedings." *Pompey*, 95 F.3d at 1550. Accordingly, in view of *Luckey V* and *Pompey*, the lack of a class remedy in and of itself does not render the state forum inadequate.

Both the procedures in place under Chapter 39 and the appellate review of dependency court proceedings for due process violations necessitates abstention for Plaintiffs' procedural due process claim (Count 2). The ongoing jurisdiction and the ability of Plaintiffs to raise constitutional claims in dependency court mandates abstention for Plaintiffs' substantive due process claim (Count 1) and the claim under the First, Ninth, and Fourteenth Amendments (Count 3).

As no reported case has been produced where Florida's state dependency courts have considered the federal

statutory claims raised in the instant action, such claims are not barred under *Younger*. Accordingly, the remaining statutory claims, the Early and Periodic Screening, Diagnosis and Treatment claim (Count 5) and Title VI (Count 6) survive *Younger*. As juvenile jurisdiction is not extended to individuals in extended foster care pursuant to Fla. Stat. § 409.145, however, such claims are not barred by *Younger* as the first *Middlesex* prong is not met as there is no ongoing state proceeding. *See N.L. v. Dep't of Children & Family Servs.*, 770 So.2d 220 (Fla. 3d DCA 2000); *L.Y. v. Dep't. of Health & Rehabilitative Servs.*, 696 So.2d 430, 431 (Fla. 4th DCA 1997). Accordingly, *Younger* does not mandate abstention from hearing claims of individuals in extended foster care pursuant to Fla. Stat. 409.145.

C. *Rooker-Feldman* Doctrine

The *Rooker-Feldman* doctrine limits the subject matter jurisdiction of the federal courts over certain matters related to previous state court litigations. *Goodman v. Sipos*, 259 F.3d 1327, 1332 (11th Cir. 2001). The Eleventh Circuit in *Siegel v. LePore*, 234 F.3d 1163 (11th Cir. 2000) stated:

> The *Rooker-Feldman* doctrine provides that federal courts, other than the United States Supreme Court, have no authority to review the final judgments of state courts, *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486, 103 S.Ct. 1303, 1317, 75 L.Ed.2d 206 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923). The doctrine extends not only to constitutional claims presented or adjudicated by a state court, but also to claims that are "inextricably intertwined" with a state court judgment.

Feldman, 460 U.S. at 482 n. 16, 103 S.Ct. at 1315 n. 16; *Dale v. Moore*, 121 F.3d 624, 626 (11th Cir.1997).

Siegel, 234 F.3d at 1172. Even if a claim is "inextricably intertwined" with a state court's judgment, however, the doctrine does not apply if a plaintiff had no reasonable opportunity to raise the issue in the state court. *Goodman*, 259 F.3d 1332; *Liedel v. Juvenile Court of Madison County*, 891 F.2d 1542, 1545 n. 4 (11th Cir. 1990). The *Goodman* court held that the *Rooker-Feldman* doctrine is easily applicable where "the primary relief sought ... [is] an injunction preventing enforcement of the state court judgment and returning custody to the aggrieved parent." *Goodman*, 259 F.3d at 1333. Where, however, "the plaintiffs are not seeking injunctive relief that would prevent the enforcement of any child custody orders of the state court, *Rooker-Feldman* is inapplicable." *Id.*

Many of *Rooker-Feldman's* concerns mirror *Younger*'s issues and the parties have argued *Rooker-Feldman* in nearly identical fashion. The remaining two statutory claims: Early and Periodic Screening, Diagnosis and Treatment claim (Count 5) and Title VI (Count 6) survive *Rooker-Feldman* as well as Defendants have pointed to no final determination that this Court would be reviewing or proceeding that would be enjoined by a determination of the issues remaining before the Court. Similarly, the claims of individuals in extended foster care survive as well.

D. Interpreting *Alexander v. Sandoval*

On April 23, 2001, days after Magistrate Judge Dubé entered his report and recommendation, the Supreme Court handed down its decision in *Alexander v. Sandoval*, 531 U.S. 1049, 121 S.Ct. 1511 (2001). *Sandoval* is reviewed separately as it potentially impacts a number of the claims in Plaintiffs' Amended Complaint.

The subject of the litigation in *Sandoval* was Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* prohibiting racial discrimination in federally funded programs. Section 601 holds, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. 2000d. The Court ultimately concluded that claims brought under § 601 for intentional discrimination "are covered by the cause of action to enforce that section." *Sandoval*, 531 U.S. at, 121 S.Ct. at 1518.

Section 602 states that federal agencies are authorized "to effectuate provisions of ... [§ 601 of Title VI] with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute...." 42 U.S.C. § 2000d-1. The Supreme Court examined whether there is a private cause of action to enforce the regulation issued by the Department of Justice that forbids federal funding recipients from utilizing "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin...." 28 CFR § 42.104(b)(2)(1999).

The *Sandoval* court began with the proposition that private rights of action to enforce federal law must be created by Congress. *Sandoval*, 121 S.Ct. at 1519 (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578, 99 S.Ct. 2479 (1979)). "The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Sandoval*, 121 S.Ct. at 1519 (citing *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15, 100 S.Ct. 242 (1979)).

The *Sandoval* Court rejected *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, (1974) (holding that § 601 prohibits disparate impact discrimination) and held that disparate-impact regulations reach beyond § 601 by forbidding conduct that § 601 permits. *Sandoval*, 121 S.Ct. at 1519. According to *Sandoval*, conduct that § 601 does not forbid, that is conduct in violation only of the disparate impact regulations, must derive its force from § 602 if from anywhere. *See id.* Stated differently, disparate impact regulations, which reach beyond § 601's directives, cannot create a private right of action standing alone, they depend on what Congress intended in creating § 602.

The *Sandoval* Court therefore turned to the text of § 602 to determine if it provided "rights-creating" language as § 601 clearly did. *Sandoval*, 121 S. Ct. at 1521. While § 602 authorizes agencies to pass regulations detailing means of compliance with the directives of Title VI and their enforcement, the Court determined that "rights-creating" language "is completely absent from § 602." *Id.* Since disparate impact regulations reach beyond the letter of § 601, which prohibits only intentional discrimination, the Court held that no private right existed to bring a suit under the Justice Department's disparate impact regulation, and the

methods provided in § 602 for enforcing its regulations do not create a private remedy. *Id.* The Court concluded that there was no Congressional intent to create a "freestanding private right of action to enforce regulations promulgated under § 602," and, therefore, "no such right of action exists." *Id.* at 1523.

In its majority opinion, the *Sandoval* Court did not address whether a suit utilizing 42 U.S.C. § 1983 could be brought for a violation of regulations passed pursuant to § 602. In his dissent, Justice Stevens stated, "Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief; indeed, the plaintiffs in this case (or other similarly situated individuals) presumably retain the option of re-challenging Alabama's English-only policy in a complaint that invokes § 1983 even after today's decision." *Sandoval*, 121 S.Ct. at 1527 (Stevens, J., dissenting). Only a handful of district courts have of yet engaged in a detailed analysis of *Sandoval*.[19] Few district courts have thoroughly analyzed *Sandoval* in a suit brought pursuant to 42 U.S.C. § 1983 based on disparate impact regulations issued pursuant to § 602.[20] This Court has found no reported case that has applied *Sandoval* to ASFA and Medicaid.

---

[19] The Eleventh Circuit in *Johnson v. Bd. of Regents of the Univ. of Georgia*, 263 F.3d 1234 (11th Cir. 2001) cited *Sandoval* in support of its holding that the district court committed no error in denying Plaintiffs' motion to amend their complaint and add a claim for disparate impact discrimination based on Department of Education regulations promulgated under § 602.

[20] Noteworthy among the district court cases are the following. In *South Camden Citizens in Action v. New Jersey Dep't of Envtl. Prot.*, 145 F.Supp.2d 505 (D.N.J. 2001), the district court had issued an injunction and declaratory judgment against the commissioner of the state's environmental protection agency for issuing air permits that the court determined had a disparate impact in violation of the regulations passed

The question remains, therefore, as to whether a plaintiff suing one under § 1983's cause of action can do so for a violation of the regulations promulgated pursuant to § 602. The question of whether a Plaintiff suing one acting under color of law utilizing § 1983 can do so for a violation of the regulations passed pursuant to § 602 or another statute. Clearly where there is a freestanding private right of action

---

pursuant to § 602 by the Environmental Protection Agency. When the *Sandoval* decision was issued, the district court set a briefing schedule and evaluated whether plaintiffs were entitled to the injunction under § 1983 for the violation of the federal regulations. Taking a cue from Justice Stevens's dissent in *Sandoval*, the *South Camden* court determined that *Sandoval* did not preclude § 1983 actions, even those brought under § 602 of Title VI. After a lengthy analysis of whether regulations passed pursuant to § 602 could create a federal right actionable under § 1983; *South Camden*, 145 F.Supp.2d at 516-20, the district court applied the *Wilder-Blessing* analysis and determined that the injunction could be upheld under § 1983. *South Camden*, 145 F.Supp.2d at 524-49; *see generally Wilder v. Virginia Hosp. Assn.*, 496 U.S. 498, 509, 110 S.Ct. 2510, 2517 (1990); *Blessing v. Freestone*, 520 U.S. 329, 340, 117 S.Ct. 1353 (1997). *See also Frederick L. v. Dept of Public Welfare*, 157 F.Supp.2d 509, 533-34 (E.D. Pa. 2001) (actions brought under Title II of the ADA and the Rehabilitation Act were permissible under § 1983); *Access Living of Metro. Chicago v. Chicago Transit Auth.*, No. 00C0770, 2001 WL 492473 (N.D. Ill. May 9, 2001) (holding Plaintiffs had stated a claim for intentional discrimination under the ADA and § 504).

Lucero v. Detroit Pub. Sch., 160 F.Supp.2d 767 (E.D. Mich. 2001) contains a rather detailed discussion of *Sandoval* and § 1983. In *Lucero*, the district court concluded that there was a private right enforceable under § 1983 for violations of regulations passed pursuant to § 602. The *Lucero* court, however, resides in the Sixth Circuit, which has a more liberal standard regarding whether federal rights can stem from regulations to uphold § 1983 claims. *See Loschiavo v. City of Dearborn*, 33 F.3d 548, 554 (6th Cir. 1994) (holding federal regulations have the force of law and may create enforceable rights); *but see Harris v. James*, 127 F.3d 993, 1009 (11th Cir. 1997) (holding Congress must unambiguously confer federal rights on the plaintiff).

there is no necessity for invoking § 1983's private right of action. Where an enforceable private right of action has been found, a "federal right" necessarily exists as required by the Supreme Court in *Wilder v. Virginia Hosp. Assn.*, 496 U.S. 498, 509, 110 S.Ct. 2510, 2517 (1990) and *Blessing v. Freestone*, 520 U.S. 329, 340, 117 S.Ct. 1353 (1997). Where, however, no private right of action exists outside of § 1983, a court must evaluate whether the statute creates a "federal right." Of course, a determination of this question impacts the claims brought alleging violations of other statutes that either do not or do not clearly embrace a private right of action.

This Court, therefore, must determine whether the disparate impact claim brought pursuant to § 1983's private right of action survives *Sandoval*. Similarly, this Court must decide whether the counts brought pursuant to the remaining statutory cause of action, the Early and Periodic Screening, Diagnosis and Treatment Provisions of the Medicaid Title ("EPSDT"), 42 U.S.C. §§ 1396a(a)(43) and 1396d(r) are privately enforceable against Defendants.

E. Section 1983

Section 1983 imposes liability on anyone who, acting under color of state law, deprives a person of "any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. The Supreme Court has held that section 1983 can be used to vindicate violations of federal statutory rights. *Maine v. Thiboutot*, 448 U.S. 1, 4-8, 100 S.Ct. 2502, 2504-06 (1980); *see also Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105, 110 S.Ct. 444, 448 (1989) ("As the language of the statute plainly indicates, the remedy encompasses violations of federal statutory as well as constitutional rights.").

1. Genesis of a Federal Right

As the Supreme Court held in *Blessing v. Freestone*, 520 U.S. 329, 117 S.Ct. 1353 (1997):

> In order to seek redress through § 1983, however, a plaintiff must assert the violation of a federal right, not merely a violation of federal law. We have traditionally looked at three factors when determining whether a particular statutory provision gives rise to a federal right. First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

Blessing, 520 U.S. at 340-41,117 S.Ct. at 1359-60 (citations omitted); *see also Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509, 110 S.Ct. 2510, 2517, 110 L.Ed.2d 455 (1990) ("Such an inquiry turns on whether the provision in question was intended to benefit the putative plaintiff, if so, the provision creates an enforceable right unless it reflects merely a congressional preference for a certain kind of conduct rather than a binding obligation on the governmental unit, or unless the interest the plaintiff asserts is too vague and amorphous such that it is beyond the competence of the judiciary to enforce.") (citations omitted).

There is a split in the circuits over whether a "federal right" can stem from a regulation. The Eleventh Circuit, however, has unequivocally spoken to this issue and such determination is binding on this Court. The Eleventh Circuit has held that federal rights must ultimately emanate from either explicit or implicit statutory requirements and not solely from a regulation. *Harris v. James*, 127 F.3d 993, 1009 n. 21(11th Cir. 1997); *see also Doe v. Chiles*, 136 F.3d 709, 713 (11th Cir. 1998) (noting the prior Eleventh Circuit rejection of the notion of finding enforceable rights in any valid administrative interpretation of a statute that creates some enforceable right). The *Harris* court stated:

> [I]f the regulation defines the content of a statutory provision that creates no federal right under the three-prong test, or if the regulation goes beyond explicating the specific content of the statutory provision and imposes distinct obligations in order to further the broad objectives underlying the statutory provision, we think the regulation is too far removed from Congressional intent to constitute a 'federal right' enforceable under § 1983.

Harris, 127 F.3d at 1009. The *Harris* court determined that Supreme Court precedent requires "Congressional intent to create federal rights" and had directed that "courts must find that Congress has unambiguously conferred federal rights on the plaintiff" *Id.* (citing *Suter v. Artist M.*, 503 U.S. 347, 357, 112 S.Ct. 1360, 1367 (1992); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 18, 24-25, 101 S.Ct. 1531, 1540, 1543-44. (1981)).[21]

---

[21] Not only are the Eleventh Circuit decisions wholly in line with Supreme Court precedent, they foreshadow the Supreme Court's decision in *Sandoval* where the Court held, "Language in a regulation may invoke

2. Is Private Enforcement Foreclosed by a Remedial Scheme

Just prior to *Blessing*, the Eleventh Circuit in *Maynard v. Williams*, 72 F.3d 848, 852 (11th Cir. 1996) held, "(1) For an action to be cognizable under § 1983, it is not enough that the conduct in question merely violates federal law -- that violation must trammel a 'right' secured by federal law; (2) Even if the statute in question creates such a right, a private right of action under § 1983 may still be unavailable if Congress has foreclosed private enforcement in the enactment of the statute through the inclusion of sufficiently comprehensive remedial devices." (citing *Wehunt v. Ledbetter*, 875 F.2d 1558, 1563 (11th Cir. 1989); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20-21, 101 S.Ct. 2615, 2626-27 (1981)). This second inquiry -- whether private enforcement has been foreclosed because of a remedial scheme is apparent in *Blessing* and subsequent Supreme Court decisions as well. *Blessing* held, "Even if a plaintiff demonstrates that a federal statute creates an individual right, there is only a rebuttable presumption that the right is enforceable under § 1983. Because our inquiry focuses on congressional intent, dismissal is proper if Congress specifically foreclosed a remedy under § 1983." *Blessing*, 520 U.S. at 340-41,117 S.Ct. at 1359-60 (citations and internal quotations omitted); *see also Alexander v. Sandoval*, 531 U.S. 1049, 121 S.Ct. 1511, 1522 (2001) ("And as our Rev. Stat. § 1979, 42 U.S.C. § 1983 cases show, some remedial schemes foreclose a private cause of action to enforce even those statutes that

---

a private right of action that Congress through statutory text created, but it may not create a right that Congress has not." *Sandoval*, 121 S. Ct. at 1522. Furthermore, *Sandoval* held, "But it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress." *Id.*

admittedly create substantive private rights.") (citation omitted).

The questions, then, for this Court are, first, whether the statutes at issue create federal rights enforceable under § 1983. Second, where a regulation is involved, whether the regulations reach beyond the specific content of the statute and imposes a distinct obligation to be enforceable. Finally, even where a substantive federal right exists, whether Congress has foreclosed enforcement through a remedial scheme.

F. Title VI - Disparate Impact Regulations

The Amended Complaint does not separate claims for intentional discrimination, brought pursuant to § 601, from those brought for disparate impact. The intentional discrimination claims clearly survive. *See Sandoval*, 121 S. Ct. at 1518 ("We do not doubt that regulations applying § 601's ban on intentional discrimination are covered by the cause of action to enforce that section."). The disparate impact claim, however, presents a thornier issue. Notwithstanding Justice Stevens's dissent in *Sandoval* and the opinions of other district courts that have reckoned with *Sandoval*, the *Sandoval* majority's analysis, in the opinion of this Court, precludes the enforcement of disparate impact regulations under § 1983 in light of prior Supreme Court and Eleventh Circuit precedent, specifically *Blessing v. Freestone*, 520 U.S. 329, 117 S.Ct. 1353 (1997) and *Harris v. James*, 127 F.3d 993 (11th Cir. 1997).

Under *Harris* no "federal right" exists to be enforced under § 1983 where a regulation "defines the content of a statutory provision that creates no federal right under [*Blessing*'s] three-prong test" or "goes beyond explicating

the specific content of the statutory provision and imposes distinct obligations. . . ." *Harris v. James*, 127 F.3d 993, 1009 (11th Cir. 1997). The Supreme Court held in *Sandoval* that disparate impact regulations do not derive their force from § 601, but rather from § 602. *Sandoval*, 121 S.Ct. at 1519. *Sandoval* also held that § 602 does not contain any "rights-creating" language. *Id.* at 1521 ("It is immediately clear that the "rights-creating" language so critical in the Court's analysis in *Cannon* of § 601, . . . is completely absent from § 602."). The *Sandoval* Court also determined that:

> Section 602 . . . focuses neither on the individuals protected nor even on the funding recipients being regulated, but on the agencies that will do the regulating. Like the statute found not to create a right of action in *Universities Research Assn., Inc. v. Coutu*, 450 U.S. 754, 101 S.Ct. 1451, 67 L.Ed.2d 662 (1981), § 602 is 'phrased as a directive to federal agencies engaged in the distribution of public funds,' *id.*, at 772, 101 S.Ct. 1451.

Sandoval, 121 S.Ct. at 1521. As § 602 does not contain any "rights-creating" language and focuses on the agencies rather than individuals, a regulation that creates rights for individuals -- such as the disparate impact regulations passed pursuant to § 602 -- necessarily imposes distinct obligations beyond the specific content of the statute. Under *Harris*, such regulations cannot be enforced privately through 1983.

Putting *Harris* aside, this result is also correct on different grounds. Of course, Congressional intent is determinative on whether a private right and private remedy exists. *Sandoval*, 121 S.Ct, at 1519. The Supreme Court has already determined that no freestanding private right of

action exists for disparate impact regulations. *Id.* at 1523. To hold that these same regulations are enforceable under § 1983 would be equivalent to holding that while Congress did not intend § 602 regulations to be enforceable against private entities, it intended them to be enforceable against state actors. Regardless of whether one deems *Sandoval* to have been correctly decided, there is no evidence that Title VI should be interpreted differently against state actors.

Additionally, both *Maynard* and *Blessing* have determined that, notwithstanding whether a substantive private right exists, a private right of action under § 1983 may still be unavailable if private enforcement has been foreclosed by Congress through sufficiently comprehensive remedial devices. *Maynard*, 72 F.3d at 852; *Blessing*, 520 U.S. at 340-41,117 S.Ct. at 1359-60; *see also Sandoval*, 121 S.Ct. at 1522 (stating that in the § 1983 context some remedial schemes foreclose a private cause of action to enforce even where those statutes create substantive private rights) (citing *Middlesex*, 453 U.S. 1, 101 S.Ct. 2615). The *Sandoval* Court did not reach the question of whether § 602's remedial scheme forecloses private enforcement. The Court, however, did indicate that § 602 seemed to create a remedial scheme that would foreclose private enforcement of regulations passed pursuant to its authority. *Sandoval*, 121 S.Ct. at 1521 ("Nor do the methods that § 602 goes on to provide for enforcing its authorized regulations manifest an intent to create a private remedy; if anything, they suggest the opposite. . . . Whatever these elaborate restrictions on agency enforcement may imply for the private enforcement of rights created outside of § 602, . . . they tend to contradict a congressional intent to create privately enforceable rights through § 602 itself.") (citations omitted). This Court does not reach whether § 602's remedial scheme forecloses private enforcement, for as previously determined by reading *Sandoval in pari materia* with *Harris*, the disparate impact

regulations do not contain a substantive private right. Therefore, Defendants' motion to dismiss is GRANTED as to Plaintiffs disparate impact regulations, however, under *Sandoval* Defendants' motion to dismiss on the intentional discrimination claim is DENIED.

G. Medicaid Act - Early and Periodic Screening, Diagnosis and Treatment

"Medicaid is a cooperative federal-state program through which the Federal Government provides financial assistance to States so that they may furnish medical care to needy individuals." *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 502, 110 S.Ct. 2510, 2513 (1990). Participation in the program is voluntary, but once a state chooses to participate, it must comply with certain requirements imposed by the Medicaid Act and regulations promulgated by the Secretary of HHS. *See Wilder*, 496 U.S. at 502, 110 S.Ct. at 2513; *Doe v. Chiles*, 136 F.3d 709, 714 (11th Cir. 1998); *Tallahassee Memorial Regional Medical Center v. Cook*, 109 F.3d 693, 698 (11th Cir. 1997) (per curiam). Florida has elected to do so. *Doe*, 136 F.3d at 714; Fla. Stat. § 409.904(3). Plaintiffs bring this cause of action asserting there is a right enforceable under § 1983 based on 42 U.S.C. § 1396a(a)(43). The Court notes that *Harris*'s holding that a right cannot emanate solely from a regulation and impose a distinct obligation does not impact Plaintiffs' Early and Periodic Screening, Diagnosis and Treatment ("EPSDT") claim which is grounded in a statute. *See Harris v. James*, 127 F.3d 993, 1009 (11th Cir. 1997).

The first factor for the Court to address is whether Congress has "intended that the provision in question benefit the plaintiff." *Blessing v. Freestone*, 520 U.S. 329, 340-41, 117 S.Ct. 1353, 1359-60 (1997). Section 1369a(a)(43) provides for:

> (A) informing all persons in the State who are under the age of 21 and who have been determined to be eligible for medical assistance . . . of the availability of early and periodic screening, diagnostic, and treatment services as described in section 1396d(r) of this title and the need for age-appropriate immunizations against vaccine-preventable diseases,
>
> (B) providing or arranging for the provision of such screening services in all cases where they are requested,
>
> (C) arranging for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment the need for which is disclosed by such child health screening services. . . .

42 U.S.C. § 1396a(a)(43). The plain language of § 1396a(a)(43) is that all eligible persons in the state under the age of twenty-one receive increased healthcare services. *See Dajour B. v. City of New York*, No. 00 CIV, 2044(JGK), 2001 WL 830674, at *8 (S.D.N.Y. July 23, 2001). Eligibility is determined by 42 U.S.C. §§ 1396a(a)(10)(A) & 1396d(a)(4)(B) and includes foster children. *Id.* The federal right conferred on eligible children under the age of twenty-one emanating from these subsections of § 1396a(a)(43) meets the first *Blessing* factor as it is sufficiently intended to benefit eligible individuals. *See Doe v. Chiles*, 136 F.3d at 715; *Dajour B.*, 2001 WL 830674, at * 8.

Next, the Plaintiffs must demonstrate that the right "assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial

competence." *Blessing*, 520 U.S. at 340-41, 117 S.Ct. at 1359-60. In this context, this Court must determine whether it has the institutional competence to enforce a foster child's right (1) to be informed of the availability of early and periodic screening, diagnostic, and treatment services (as provided by § 1396d(r)(l)-(5))[22] and the need for appropriate

---

[22] Section l396d(r)(1)-(5) holds:

> The term "early and periodic screening, diagnostic, and treatment services" means the following items and services:
>
> (1) Screening services--
>
> (A) which are provided --
>
> (i) at intervals which meet reasonable standards of medical and dental practice, as determined by the State after consultation with recognized medical and dental organizations involved in child health care and, with respect to immunizations under subparagraph (B)(iii), in accordance with the schedule referred to in section 1396s(c)(2)(B)(i) of this title for pediatric vaccines, and
>
> (ii) at such other intervals, indicated as medically necessary, to determine the existence of certain physical or mental illnesses or conditions; and
>
> (B) which shall at a minimum include--
>
> (i) a comprehensive health and developmental history (including assessment of both physical and mental health development),
>
> (ii) a comprehensive unclothed physical exam,
>
> (iii) appropriate immunizations (according to the schedule referred to in section 1396s(c)(2)(B)(i) of this title for pediatric vaccines) according to age and health history,
>
> (iv) laboratory tests (including lead blood level assessment appropriate for age and risk factors), and
>
> (v) health education (including anticipatory guidance).
>
> (2) Vision services--

immunizations; (2) to be provided with such screening services when requested; and (3) to have arranged necessary corrective treatment for the specific services. *See e.g.*, *Doe*, 136 F.3d at 716.

Defendants rely heavily on *Charlie H. v. Whitman*, 83 F.Supp.2d 476, 499 (D.N.J. 2000). That court examined EPSDT and drew parallels to Title IV-D of the Social Security Act -- the statute deemed to be too vague by the *Blessing* Court. *Id.* Focusing on 1396d(r) alone, the *Charlie H.* court determined that "the right to receive any and all treatments deemed necessary" was too vague for judicial enforcement. *Id.* Plaintiffs in the instant case allege that Defendants, who are bound to comply with the Medicaid Act, are not providing the services required by § 1396a(a)(43) and specifically defined by § 1396d(r) at all. Plaintiffs are not asking this Court to review what treatments are necessary or whether the state has made a bad policy decision, but whether the information, screening services,

---

. . . (B) which shall at a minimum include diagnosis and treatment for defects in vision, including eyeglasses.

(3) Dental services--

. . . (B) which shall at a minimum include relief of pain and infections, restoration of teeth, and maintenance of dental health.

(4) Hearing services--

. . . (B) which shall at a minimum include diagnosis and treatment for defects in hearing, including hearing aids.

(5) Such other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of this section to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan.

and necessary corrective treatment as determined by the state itself have been provided. Guaranteeing the rights under § 1396a(a)(43) of a foster child for the provision of the specific medical services listed in 42 U.S.C. § 1396d(r) is not outside the judicial competence. *See Dajour B.*, 2001 WL 830674, at * 10; *Frew v. Gilbert* 109 F.Supp.2d 579, 600-13; *Salazar v. District of Columbia*, 954 F. Supp. 278, 303-07 (D.D.C. 1996).

The third *Blessing* factor requires this Court to examine whether § 1396a(a)(43) unambiguously imposes a binding obligation on the states. *Blessing*, 520 U.S. at 340-41, 117 S.Ct. at 1359-60. Section 1396a(a)(43) provides, "A State plan for medical assistance *must* . . . provide for" informing children of the availability of the services provided by § 1396d(r)(1)-(5)) and the need for appropriate immunizations, providing such screening services when requested, and arranging for necessary corrective treatment. *See* § 1396a(a)(43)(A-C) (emphasis added). Once a state accepts the funding, as Florida has, § 1396a is mandatory rather than precatory. *See Doe*, 136 F.3d at 718.

These provision of § 1396a are sufficiently individualized, particularized, and mandatory under the *Blessing* test to support a § 1983 claim. *See Dajour B.*, 2001 WL 830674, at * 9. The Court also finds that the portion of *Maynard v. Williams*, 72 F.3d 848, 852 (11th Cir. 1996), regarding the inclusion of sufficiently comprehensive remedial devices, does not foreclose enforcement under § 1983 for the same reasons that *Seminole Tribe* is inapplicable.

H. Preclusion

There are three preclusion doctrines that often fall under the sweeping rubric of "*res judicata*" and are concerned with the preclusive effect of a prior adjudication. The first is "claim preclusion" or true *res judicata* and treats a judgment as the full measure of relief to be accorded between the same parties on the same claim or cause of action. Claim preclusion operates to avoid multiple suits on identical obligations between the same parties. *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 414 (1980) ("Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.") (citing *Cromwell v. County of Sac*, 94 U.S. 351, 352, 24 L.Ed. 195 (1876)). The second is collateral estoppel or "issue preclusion." Issue preclusion bars the relitigation of issues actually adjudicated, and essential to the judgment, in a prior litigation between the same parties. Allen, 449 U.S. at 94, 101 S.Ct. at 414-15 ("Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.") (citing *Montana v. U.S.*, 440 U.S. 147, 153, 99 S. Ct. 970, 973 (1979)).

Two cases previously filed and settled in the Southern District of Florida form the basis of Defendants preclusion argument. The first is *Children A-F v. Chiles*, No. 90-2416-C.V.-KEHOE (S.D. Fla.) and the second is *M.E. v. Bush*, No. 90-1008-C.V.-MOORE (S.D. Fla.). *A-F* involved identical allegations with the exception of two: Plaintiffs claim for violation of the First, Ninth, and Fourteenth Amendment and the claims for violation of Title VI. *A-F* was settled on February 27, 1995, and the case was dismissed with prejudice on July 24, 1995. It is undisputed that the claims of Plaintiffs that stem from actions that occurred prior to July 24, 1995, and those who were class members in *A-F*

cannot raise those claims in this suit. It is also undisputed that those alleged violations occurring after the date the case was closed before Judge Kehoe are not precluded. Those claims that were litigated or could have been litigated in that suit regardless of whether the particular type of claim was raised by those plaintiffs before Judge Kehoe are barred under principles of *res judicata*. *See In re: Piper Aircraft*, 244 F.3d 1289, 1296 (11th Cir. 2001) ("Under *res judicata*, also known as claim preclusion, a final judgment on the merits bars the parties to a prior action from re-litigating a cause of action that was or could have been raised in that action.") (citation omitted).

The recent approval of the settlement in *M.E.* on September 26, 2001 also invokes preclusion principles. The class in that suit includes "children who are now or in the future will be in the legal or physical custody of the State of Florida, including children who are dependent or delinquent, whom the State knows or should know have a need for mental health services." *M.E. v. Bush*, No. 90-1008, slip op. at 3 (S.D. Fla. Sept. 26, 2001). The type of claims covered include the "screening, assessing, service planning, and service delivery to class members while in the physical or legal custody of DCF or DJJ." *Id.* at Ex. A. ¶ 5. To avoid having overlapping classes such claims that involve mental health services are precluded. *See Prado-Steiman v. Bush*, 221 F.3d 1266, 1282 (11th Cir. 2000).

K. Adequacy of the Amended Complaint

In *Anderson v. Dist. Bd. of Trustees of Centr. Florida Comm. Coll* 77 F.3d 364, 366-7 (11th Cir. 1996), the court, concerned about the ramifications of cases proceeding on the basis of "shotgun" pleadings, noted:

> Experience teaches that, unless cases are pled clearly and precisely, issues are not joined, discovery is not controlled, the trial court's docket becomes unmanageable, the litigants suffer, and society loses confidence in the court's ability to administer justice.

See also Magluta v. Samples, 256 F.3d 1282 (11th Cir. 2001); *Cesnik v. Edgewood Baptist Church*, 88 F.3d 902, 905 (11th Cir. 1996); *L.S.T, Inc. v. Crow*, 49 F.3d 679, 684 (11th Cir. 1995). Such "shotgun" pleading imperils fundamental principles of due process.

The Eleventh Circuit has expressed increased frustration with district courts that let the case proceed despite such shotgun pleadings. *See Byrne v. Nezhat*, 261 F.3d 1075, 1130(11th Cir 2001). The *Byrne* court sought to avoid having district courts undergo the time-consuming process of "rearranging the pleadings and discerning whether the plaintiff has stated a claim, or claims, for relief, and whether the defendant's affirmative defenses are legally sufficient." *Id.* at 1129. The *Byrne* panel also counseled, "Shotgun pleadings, if tolerated, harm the court by impeding its ability to administer justice. The time a court spends managing litigation framed by shotgun pleadings should be devoted to other cases waiting to be heard." *Id.* at 1131.

With this admonition in mind, the Court turns its attention to the 116-page complaint at issue. Pages 3 through 49 contain a narrative account of the history of each Plaintiff that reads like a closing argument and violates Fed.R.Civ.P. 8's mandate that the complaint contain "a short and plain statement of the claim." Pages 60 through 88 contain a sprawling exposition of alleged violations of the substantive due process rights of the Plaintiffs. The next seven pages are

dedicated to procedural due process violations, two then are devoted to violations of the First, Ninth, and Fourteenth Amendments, two pages for ASFA, followed by a page and a half on the EPSDT, then finally three and a half pages on violations of Title VI. On page 104 Plaintiffs finally outline their six causes of action and seek to incorporate into these causes of action paragraphs 1 through 137 and 139 through 217 (leaving out only paragraphs 138, 218, and 219). Plaintiffs' prayer for relief begins on page 110 and spills over onto page 113 by two lines. Accordingly, Plaintiffs are directed to file a second amended complaint that complies with the Federal Rules of Civil Procedure and this order as set forth below.

Conclusion

It is adjudged that Plaintiffs' claim under Adoption and Safe Families Act (Count 4) is barred under the Eleventh Amendment and *Seminole Tribe*. All of Plaintiffs' Title VI § 602 claim (in Count 6) is also barred in light of *Sandoval* and *Harris*. Furthermore, under *Younger* this Court must abstain from deciding Plaintiffs' substantive due process claim (Count 1), procedural due process claim (Count 2), the claim under the First, Ninth, and Fourteenth Amendments (Count 3) for all Plaintiffs not in extended foster care. Accordingly, Defendants' motions to dismiss are GRANTED on these claims which are DISMISSED with prejudice. However, Counts 1 through 3 survive this order for individuals in extended foster care. Nevertheless, as Plaintiffs failed to comply with Rule 8, the Amended complaint is DISMISSED without prejudice.

Plaintiffs are directed to file a second amended complaint that is consistent with this order no later than **December 21, 2001**. The second amended complaint should

consist of a brief statement of Plaintiffs and their claims and should include the following **three** counts: Count 1 pursuant to § 1983 for alleged violations of constitutional rights of individuals in extended foster care only; Count 5 for alleged violations of Early and Periodic Screening, Diagnosis and Treatment statute; and Count 6 for alleged violations of Title VI § 601 dealing with intentional discrimination only. Plaintiffs are also required to determine which of the Plaintiffs are no longer suitable to be class representatives because of a lack of standing or mootness under *Prado-Steiman v. Bush*, 221 F.3d 1266 (11th Cir. 2000).

DONE AND ORDERED in Chambers at Miami, Florida, this 3rd day of December, 2001.

/s/ Federico A. Moreno
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-10180-GG

---

31 FOSTER CHILDREN, on behalf of themselves and all other Children in Florida Foster Care,

Plaintiffs-Appellants,

v.

JEB BUSH, as Governor of the State of Florida,
KATHLEEN KEARNEY, as Secretary of the Florida Department of Children and Families,
CHUCK BATES, District Administrator,
ROBERT WILLIAMS, District Administrator,
ESTER TIBBS, District Administrator, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

---

BEFORE: ANDERSON and CARNES, Circuit Judges, and HAND*, District Judge.

PER CURIAM:

The petition for rehearing filed by Appellants, 31 FOSTER CHILDREN, on behalf of themselves and all other Children in Florida Foster Care, is DENIED.

ENTERED FOR THE COURT:

/s/ Ed Carnes
UNITED STATES CIRCUIT JUDGE

---

*Honorable William B. Hand, United States District Judge for the Southern District of Alabama, sitting by designation.

APPENDIX D

(Excerpted from Amended Complaint)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Case Number: 00-2116-CIV-HUCK

FOSTER CHILDREN BONNIE L., by and through her next friend Donald Hadsock; REGGIE B. and REBECCA B., by and through their next friend Danielle Roussel; LAURIE S. and LILLIE S., by and through their next friend Danielle Roussel; LESLIE F., by and through her next friend Brenda Shapiro; SANDRA M., by and through her next friend Danielle Roussel; TANYA N., by and through her next friend Danielle Roussel; CANDICE D. and JAY D., by and through their next friend Lori A. Haythorn; MATTHEW I., by and through his next friend Danielle Roussel; HUGH S., by and through His next friend Danielle Roussel; LEANNE G. and TANMY G., by and through their next friend Danielle Roussel; ELAINE R., by and through her next friend Kristi Kassebaum; PAUL B., by and through his next friend Danielle Roussel; RACHEL C., by and through her next friend Danielle Roussel; CATHY W., by and through her next friend Danielle Roussel; LARISSA C., by her next friend, Rhoda Goodson; JOHN J., by and through his next friend Mary Miller; MELINDA and KARINA, by and through their guardian ad litem Brenda Shapiro, on behalf of themselves and all other similarly situated children,

Plaintiffs,

v.

JEB BUSH, as Governor of the State of Florida; KATHLEEN KEARNEY, as Secretary of the Florida Department of Children and Families; CHUCK BATES, JOHN AWAD, ESTER TIBBS, LEE JOHNSON, LYNN

RICHARD, DON DIXON, ROBERT MORIN, FRAN GIBBONS, PAUL BROWN, CHARLES AUSLANDER, CHRISTINE DAVENPORT, PATRICK HOWARD, SUE GRAY and VERN MARTIN, each as a District Administrator of the Florida Department of Children and Families,

Defendants.

AMENDED COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF

CLASS ACTION

---

* * *

PRAYER FOR RELIEF

WHEREFORE Plaintiffs, on behalf of themselves and the members of the class and subclass they seek to represent, request that this Court:

1. Assume and retain jurisdiction over this matter;

2. Determine that this matter may proceed as a class action pursuant to Fed. R. Civ. P. 23(a) and (b) (2);

3. Pursuant to Fed. R. Civ. P. 57 and 28 U.S.C. §§ 2201 and 2202, declare unconstitutional and unlawful: Defendants' failure to provide for Plaintiffs' and the putative class members' basic needs, safety, freedom from harm, freedom from unreasonable restraints on their liberty, care and treatment that is consistent with accepted professional

judgment and the purpose for which the children were taken into government custody, freedom from being placed into unnecessary state-created danger, and freedom from arbitrary and capricious actions and decisions that deprive them of benefits to which they are entitled; Defendants' deprivation of state-created entitlements without an adequate and fair procedure; Defendants' unnecessary separation of siblings in government custody and denial of reasonable and frequent visitation of such siblings without proper procedure; Defendants' failure to comply with the Adoption and Safe Families Act and the Early, Periodic Screening, Diagnosis and Treatment provisions of the Medicaid Title of the Social Security Act; and Defendants' discrimination on the basis of race or color in the operation of the foster care, adoption and child welfare services program for which Florida receives federal financial assistance;

4. Permanently enjoin Defendants from subjecting Plaintiffs and the members of the class they seek to represent to practices that violate their federal constitutional and statutory rights, including those identified in paragraph "C" of this Prayer for Relief;

5. Order appropriate remedial relief to ensure Defendants' future compliance with the Constitution and laws of the United States and their provision of legally mandated services, protection and procedures to Plaintiffs and the members of the class they seek to represent;

6. Appoint an expert panel with full access to Defendants, their agents; records, clients and personnel, to develop and oversee the implementation of a plan for reform, which will ensure that Defendants protect the federal constitutional and statutory rights of Plaintiffs and the members of the class they seek to represent;

7. Appoint a permanent ombudsman or children's advocate to present the interests of Plaintiffs and their putative class members to Defendants and DCAF, to whom all children in Florida foster care will have open and confidential access and with whom Defendants or their designees with authority to make decisions on Defendants' behalf will meet regularly and frequently to attempt to resolve issues that affect individual or groups of similarly situated foster children.

8. Award plaintiffs their reasonable attorneys' fees and costs pursuant to 28 U.S.C. §§ 1920 and 1988; and

9. Grant such other further equitable and other relief as the Court deems just, necessary and proper to protect Plaintiffs and the members of the class they seek to represent from further harm by Defendants.

Dated: Tallahassee, Florida
August 28, 2000

APPENDIX E

1. The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Ninth Amendment to the United States Constitution provides:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

---

2. 42 U.S.C. § 1983 provides, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable . . .

---

28 U.S.C. § 1343 provides, in relevant part:

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

---

3. Article II, Section 3 of the Florida Constitution provides:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

---

4. Florida Statute § 39.402 provides, in relevant part:

(1) Unless ordered by the court under this chapter, a child taken into custody shall not be placed in a shelter prior to a court hearing unless there is probable cause to believe that:

(a) The child has been abused, neglected, or abandoned, or is suffering from or is in imminent danger of illness or injury as a result of abuse, neglect, or abandonment;

(b) The parent or legal custodian of the child has materially violated a condition of placement imposed by the court; or

(c) The child has no parent, legal custodian, or responsible adult relative immediately known and available to provide supervision and care.

(2) A child taken into custody may be placed or continued in a shelter only if one or more of the criteria in subsection (1) applies and the court has made a specific finding of fact regarding the necessity for removal of the child from the home and has made a determination that the provision of appropriate and available services will not eliminate the need for placement . . .

(4) If the department determines that placement in a shelter is necessary under subsections (1) and (2), the authorized agent of the department shall authorize placement of the child in a shelter . . .

(6)(a) The circuit court, or the county court if previously designated by the chief judge of the circuit court for such purpose, shall hold the shelter hearing . . .

Florida Statute § 39.507 provides, in relevant part:

(1)(a) The adjudicatory hearing shall be held as soon as practicable after the petition for dependency is filed and in accordance with the Florida Rules of Juvenile Procedure, but no later than 30 days after the arraignment . . .

(4) If the court finds at the adjudicatory hearing that the child named in a petition is not dependent, it shall enter an order so finding and dismissing the case.

(5) If the court finds that the child named in the petition is dependent, but finds that no action other than supervision in the child's home is required, it may enter an order briefly stating the facts upon which its finding is based, but withholding an order of adjudication and placing the child's home under the supervision of the department. If the court later finds that the parents of the child have not complied with the conditions of supervision imposed, the court may, after a hearing to establish the noncompliance, but without further evidence of the state of dependency, enter an order of adjudication and shall thereafter have full authority under this chapter to provide for the child as adjudicated. If the child is to remain in an out-of-home placement by order of the court, the court must adjudicate the child dependent.

(6) If the court finds that the child named in a petition is dependent, but chooses not to withhold adjudication or is prohibited from withholding adjudication, it shall incorporate that finding in an order of adjudication entered in the case, briefly stating the facts upon which the finding is made, and the court shall thereafter have full authority under this chapter to provide for the child as adjudicated.

(7) At the conclusion of the adjudicatory hearing, if the child named in the petition is found dependent, the court shall schedule the disposition hearing within 30 days after the

last day of the adjudicatory hearing. All parties shall be notified in writing at the conclusion of the adjudicatory hearing by the clerk of the court of the date, time, and location of the disposition hearing . . .

Florida Statute § 39.521 provides, in relevant part:

(1) A disposition hearing shall be conducted by the court, if the court finds that the facts alleged in the petition for dependency were proven in the adjudicatory hearing, or if the parents or legal custodians have consented to the finding of dependency or admitted the allegations in the petition, have failed to appear for the arraignment hearing after proper notice, or have not been located despite a diligent search having been conducted.

(a) A written case plan and a predisposition study prepared by an authorized agent of the department must be filed with the court and served upon the parents of the child, provided to the representative of the guardian ad litem program, if the program has been appointed, and provided to all other parties, not less than 72 hours before the disposition hearing. All such case plans must be approved by the court. If the court does not approve the case plan at the disposition hearing, the court must set a hearing within 30 days after the disposition hearing to review and approve the case plan.

(b) When any child is adjudicated by a court to be dependent, the court having jurisdiction of the child has the power by order to:

1. Require the parent and, when appropriate, the legal custodian and the child, to participate in treatment and services identified as necessary.

2. Require, if the court deems necessary, the parties to participate in dependency mediation.

3. Require placement of the child either under the protective supervision of an authorized agent of the department in the home of one or both of the child's parents or in the home of a relative of the child or another adult approved by the court, or in the custody of the department. Protective supervision continues until the court terminates it or until the child reaches the age of 18, whichever date is first. Protective supervision shall be terminated by the court whenever the court determines that permanency has been achieved for the child, whether with a parent, another relative, or a legal custodian, and that protective supervision is no longer needed. The termination of supervision may be with or without retaining jurisdiction, at the court's discretion, and shall in either case be considered a permanency option for the child. The order terminating supervision by the department shall set forth the powers of the custodian of the child and shall include the powers ordinarily granted to a guardian of the person of a minor unless otherwise specified. Upon the court's termination of supervision by the department, no further judicial reviews are required, so long as permanency has been established for the child.

(c) At the conclusion of the disposition hearing, the court shall schedule the initial judicial review hearing which must be held no later than 90 days after the date of the disposition hearing or after the date of the hearing at which the court approves the case plan, whichever occurs earlier, but in no event shall the review hearing be held later than 6 months after the date of the child's removal from the home . . .

(3) When any child is adjudicated by a court to be dependent, the court shall determine the appropriate placement for the child as follows:

(a) If the court determines that the child can safely remain in the home with the parent with whom the child was residing at the time the events or conditions arose that

brought the child within the jurisdiction of the court and that remaining in this home is in the best interest of the child, then the court shall order conditions under which the child may remain or return to the home and that this placement be under the protective supervision of the department for not less than 6 months.

(b) If there is a parent with whom the child was not residing at the time the events or conditions arose that brought the child within the jurisdiction of the court who desires to assume custody of the child, the court shall place the child with that parent upon completion of a home study, unless the court finds that such placement would endanger the safety, well-being, or physical, mental, or emotional health of the child . . .

(c) If no fit parent is willing or available to assume care and custody of the child, place the child in the temporary legal custody of an adult relative or other adult approved by the court who is willing to care for the child, under the protective supervision of the department. The department must supervise this placement until the child reaches permanency status in this home, and in no case for a period of less than 6 months. Permanency in a relative placement shall be by adoption, long-term custody, or guardianship.

(d) If the child cannot be safely placed in a nonlicensed placement, the court shall commit the child to the temporary legal custody of the department. Such commitment invests in the department all rights and responsibilities of a legal custodian. The department shall not return any child to the physical care and custody of the person from whom the child was removed, except for court-approved visitation periods, without the approval of the court. The term of such commitment continues until terminated by the court or until the child reaches the age of 18. After the child is committed to the temporary legal custody of the department, all further proceedings under this section are governed by this chapter.

(e) Protective supervision continues until the court terminates it or until the child reaches the age of 18, whichever date is first. Protective supervision shall be terminated by the court whenever the court determines that permanency has been achieved for the child, whether with a parent, another relative, or a legal custodian, and that protective supervision is no longer needed. The termination of supervision may be with or without retaining jurisdiction, at the court's discretion, and shall in either case be considered a permanency option for the child. The order terminating supervision by the department shall set forth the powers of the custodian of the child and shall include the powers ordinarily granted to a guardian of the person of a minor unless otherwise specified. Upon the court's termination of supervision by the department, no further judicial reviews are required, so long as permanency has been established for the child.

(4) An agency granted legal custody shall have the right to determine where and with whom the child shall live, but an individual granted legal custody shall exercise all rights and duties personally unless otherwise ordered by the court . . .

Florida Statute § 39.601 provides, in relevant part:

(1) The department or agent of the department shall develop a case plan for each child receiving services pursuant to this chapter. A parent of a child may not be required nor coerced through threat of loss of custody or parental rights to admit in the case plan to abusing, neglecting, or abandoning a child . . .

(a) The case plan must be developed in conference with the parent of the child and any court-appointed guardian ad litem and, if appropriate, the child.

(b) The case plan must be written simply and clearly in English and, if English is not the principal language of the child's parent, to the extent possible in such principal language.

(c) The case plan must describe the minimum number of face-to-face meetings to be held each month between the parents and the department's caseworkers to review progress of the plan, to eliminate barriers to progress, and to resolve conflicts or disagreements.

(d) The case plan must be subject to modification based on changing circumstances.

(e) The case plan must be signed by all parties.

(f) The case plan must be reasonable, accurate, and in compliance with the requirements of other court orders.

(2) When the child or parent is receiving services, the case plan shall be filed with the court, for approval by the court, at least 72 hours prior to the disposition hearing. The case plan must be served on all parties whose whereabouts are known at least 72 hours prior to the disposition hearing and must include, in addition to the requirements in subsection (1), at a minimum:

(a) A description of the problem being addressed that includes the behavior or act of a parent resulting in risk to the child and the reason for the department's intervention.

(b) A description of the tasks with which the parent must comply and the services to be provided to the parent and child specifically addressing the identified problem . . .

(c) A description of the measurable objectives, including timeframes for achieving objectives, addressing the identified problem.

(3) When the child is receiving services in an out-of-home placement, the case plan must be filed with the court, for approval by the court, at least 72 hours prior to the disposition hearing. The case plan must be served on all parties whose whereabouts are known at least 72 hours prior to the disposition hearing and must include, in addition to the requirements in subsections (1) and (2), at a minimum:

(a) A description of the permanency goal for the child, including the type of placement. Reasonable efforts to place a child in a home that will serve as an adoptive placement if reunification is not successful, or with a legal custodian, may be made concurrently with reasonable efforts to prevent removal of the child from the home or make it possible for the child to return safely home.

(b) A description of the type of home or institution in which the child is to be placed.

(c) A description of the financial support obligation to the child, including health insurance, of the child's parents.

(d) A description of the visitation rights and obligations of the parents during the period the child is in care.

(e) A discussion of the safety and appropriateness of the child's placement, which placement is intended to be safe, the least restrictive and most family- like setting available consistent with the best interest and special needs of the child, and in as close proximity as possible to the child's home. The plan must also establish the role for the foster parents or legal custodians in the development of the services which are to be provided to the child, foster parents, or legal custodians. It must also address the child's need for services while under the jurisdiction of the court and implementation of these services in the case plan.

(f) A description of the efforts to be undertaken to maintain the stability of the child's educational placement.

(g) A discussion of the department's plans to carry out the judicial determination made by the court, with respect to the child, in accordance with this chapter and applicable federal regulations.

(h) A description of the plan for assuring that services outlined in the case plan are provided to the child and the child's parent or parents, to improve the conditions in the home and facilitate either the safe return of the child to the home or the permanent placement of the child.

(i) A description of the plan for assuring that services as outlined in the case plan are provided to the child, the child's parents, and the child's legal custodians, to address the needs of the child, and a discussion of the appropriateness of the services.

(j) A description of the plan for assuring that services are provided to the child and the child's legal custodians or foster parents to address the needs of the child while in an out-of-home placement, which shall include an itemized list of costs to be borne by the parent associated with any services or treatment that the parent and child are expected to receive.

(k) A written notice to the parent that failure of the parent to substantially comply with the case plan may result in the termination of parental rights, and that a material failure to substantially comply may result in the filing of a petition for termination of parental rights sooner than the compliance periods set forth in the case plan itself. The case staffing committee shall coordinate its efforts with the child protection team of the Department of Health.

(l) In the case of a child for whom the permanency plan is adoption or placement in another permanent home, documentation of the steps the agency is taking to find an adoptive family or other permanent living arrangement for the child, to place the child with an adoptive family, with a fit and willing relative, with a legal custodian, or in another

planned permanent living arrangement, and to finalize the adoption, legal guardianship, or long-term custodial relationship. At a minimum, such documentation shall include child- specific recruitment efforts such as the use of state, regional, and national adoption exchanges, including electronic exchange systems . . .

(6) After jurisdiction attaches, all case plans must be filed with the court and a copy provided to all the parties whose whereabouts are known, not less than 72 hours before the disposition hearing. The department shall also file with the court all case plans prepared before jurisdiction of the court attached. If, after review of the case plan, the court does not approve the case plan, the court shall require the parties to make necessary modifications to the plan. An amended plan must be submitted to the court for review and approval within 30 days after the hearing on the case plan. This amended plan must be served on all parties whose whereabouts are known, at least 72 hours prior to filing with the court.

(7) The case plan must be limited to as short a period as possible for the accomplishment of its provisions. Unless extended, the plan expires no later than 12 months after the date the child was initially removed from the home or the date the case plan was accepted by the court, whichever comes first . . .

(9)(a) In each case in which the custody of a child has been vested, either voluntarily or involuntarily, in the department and the child has been placed in out-of-home care, a case plan must be prepared within 60 days after the department removes the child from the home, and shall be submitted to the court before the disposition hearing, for the court to review and approve.

Florida Statute § 39.603 provides, in relevant part:

(2) When the court determines that any of the elements considered at the hearing related to the plan have not been met, the court shall require the parties to make necessary amendments to the plan. The amended plan must be submitted to the court for review and approval within 30 days after the hearing. A copy of the amended plan must also be provided to each party, if the location of the party is known, at least 72 hours prior to filing with the court . . .

Florida Statute § 39.701 provides, in relevant part:

(1)(a) The court shall have continuing jurisdiction in accordance with this section and shall review the status of the child at least every 6 months as required by this subsection or more frequently if the court deems it necessary or desirable.

(b) The court shall retain jurisdiction over a child returned to his or her parents for a minimum period of 6 months following the reunification, but, at that time, based on a report of the social service agency and the guardian ad litem, if one has been appointed, and any other relevant factors, the court shall make a determination as to whether supervision by the department and the court's jurisdiction shall continue or be terminated.

(2)(a) The court shall review the status of the child and shall hold a hearing as provided in this part at least every 6 months until the child reaches permanency status . . .

(c) If the child is placed in the custody of the department or a licensed child-placing agency for the purpose

of adoptive placement, judicial reviews must be held at least every 6 months until the adoption is finalized . . .

(6)(a) Prior to every judicial review hearing or citizen review panel hearing, the social service agency shall make an investigation and social study concerning all pertinent details relating to the child and shall furnish to the court or citizen review panel a written report that includes, but is not limited to:

1. A description of the type of placement the child is in at the time of the hearing, including the safety of the child and the continuing necessity for and appropriateness of the placement.

2. Documentation of the diligent efforts made by all parties to the case plan to comply with each applicable provision of the plan.

3. The amount of fees assessed and collected during the period of time being reported.

4. The services provided to the foster family or legal custodian in an effort to address the needs of the child as indicated in the case plan.

5. A statement that either:

a. The parent, though able to do so, did not comply substantially with the provisions of the case plan, and the agency recommendations;

b. The parent did substantially comply with the provisions of the case plan; or

c. The parent has partially complied with the provisions of the case plan, with a summary of additional progress needed and the agency recommendations.

6. A statement from the foster parent or legal custodian providing any material evidence concerning the return of the child to the parent or parents.

7. A statement concerning the frequency, duration, and results of the parent- child visitation, if any, and the agency recommendations for an expansion or restriction of future visitation.

8. The number of times a child has been removed from his or her home and placed elsewhere, the number and types of placements that have occurred, and the reason for the changes in placement. .

9. The number of times a child's educational placement has been changed, the number and types of educational placements which have occurred, and the reason for any change in placement.

10. Copies of all medical, psychological, and educational records that support the terms of the case plan and that have been produced concerning the child, parents, or any caregiver since the last judicial review hearing.

(b) A copy of the social service agency's written report and the written report of the guardian ad litem must be served on all parties whose whereabouts are known; to the foster parents or legal custodians; and to the citizen review panel, at least 72 hours before the judicial review hearing or citizen review panel hearing. The requirement for providing parents with a copy of the written report does not apply to those parents who have voluntarily surrendered their child for adoption or who have had their parental rights to the child terminated.

(c) In a case in which the child has been permanently placed with the social service agency, the agency shall furnish to the court a written report concerning the progress being made to place the child for adoption. If the child cannot be placed for adoption, a report on the progress made by the child towards alternative permanency goals or placements, including, but not limited to, guardianship, long-term custody, long-term licensed custody, or independent living, must be submitted to the court. The report must be

submitted to the court at least 72 hours before each scheduled judicial review . . .

(7) The court and any citizen review panel shall take into consideration the information contained in the social services study and investigation and all medical, psychological, and educational records that support the terms of the case plan; testimony by the social services agency, the parent, the foster parent or legal custodian, the guardian ad litem if one has been appointed for the child, and any other person deemed appropriate; and any relevant and material evidence submitted to the court, including written and oral reports to the extent of their probative value. These reports and evidence may be received by the court in its effort to determine the action to be taken with regard to the child and may be relied upon to the extent of their probative value, even though not competent in an adjudicatory hearing. In its deliberations, the court and any citizen review panel shall seek to determine:

(a) If the parent was advised of the right to receive assistance from any person or social service agency in the preparation of the case plan.

(b) If the parent has been advised of the right to have counsel present at the judicial review or citizen review hearings. If not so advised, the court or citizen review panel shall advise the parent of such right.

(c) If a guardian ad litem needs to be appointed for the child in a case in which a guardian ad litem has not previously been appointed or if there is a need to continue a guardian ad litem in a case in which a guardian ad litem has been appointed.

(d) The compliance or lack of compliance of all parties with applicable items of the case plan, including the parents' compliance with child support orders.

(e) The compliance or lack of compliance with a visitation contract between the parent and the social service agency for contact with the child, including the frequency, duration, and results of the parent-child visitation and the reason for any noncompliance.

(f) The compliance or lack of compliance of the parent in meeting specified financial obligations pertaining to the care of the child, including the reason for failure to comply if such is the case.

(g) The appropriateness of the child's current placement, including whether the child is in a setting which is as family-like and as close to the parent's home as possible, consistent with the child's best interests and special needs, and including maintaining stability in the child's educational placement.

(h) A projected date likely for the child's return home or other permanent placement.

(i) When appropriate, the basis for the unwillingness or inability of the parent to become a party to a case plan. The court and the citizen review panel shall determine if the efforts of the social service agency to secure party participation in a case plan were sufficient.

(8)(a) Based upon the criteria set forth in subsection (7) and the recommended order of the citizen review panel, if any, the court shall determine whether or not the social service agency shall initiate proceedings to have a child declared a dependent child, return the child to the parent, continue the child in out-of-home care for a specified period of time, or initiate termination of parental rights proceedings for subsequent placement in an adoptive home. Modifications to the plan must be handled as prescribed in s. 39.601. If the court finds that the prevention or reunification efforts of the department will allow the child to remain safely at home or be safely returned to the home, the court shall allow the child

to remain in or return to the home after making a specific finding of fact that the reasons for the creation of the case plan have been remedied to the extent that the child's safety, well-being, and physical, mental, and emotional health will not be endangered.

(b) The court shall return the child to the custody of the parents at any time it determines that they have substantially complied with the case plan, if the court is satisfied that reunification will not be detrimental to the child's safety, well-being, and physical, mental, and emotional health.

(c) If, in the opinion of the court, the social service agency has not complied with its obligations as specified in the written case plan, the court may find the social service agency in contempt, shall order the social service agency to submit its plans for compliance with the agreement, and shall require the social service agency to show why the child could not safely be returned to the home of the parents.

(d) The court may extend the time limitation of the case plan, or may modify the terms of the plan, based upon information provided by the social service agency, and the guardian ad litem, if one has been appointed, the parent or parents, and the foster parents or legal custodian, and any other competent information on record demonstrating the need for the amendment. If the court extends the time limitation of the case plan, the court must make specific findings concerning the frequency of past parent-child visitation, if any, and the court may authorize the expansion or restriction of future visitation. Modifications to the plan must be handled as prescribed in s. 39.601. Any extension of a case plan must comply with the time requirements and other requirements specified by this chapter.

(e) If, at any judicial review, the court finds that the parents have failed to substantially comply with the case plan to the degree that further reunification efforts are without merit and not in the best interest of the child, it may authorize

the filing of a petition for termination of parental rights, whether or not the time period as contained in the case plan for substantial compliance has elapsed.

(f) No later than 12 months after the date that the child was placed in shelter care, the court shall conduct a judicial review to plan for the child's permanency. At this hearing, if the child is not returned to the physical custody of the parents, the case plan may be extended with the same goals only if the court finds that the situation of the child is so extraordinary that the plan should be extended. The case plan must document steps the department is taking to find an adoptive parent or other permanent living arrangement for the child.

(g) The court may issue a protective order in assistance, or as a condition, of any other order made under this part. In addition to the requirements included in the case plan, the protective order may set forth requirements relating to reasonable conditions of behavior to be observed for a specified period of time by a person or agency who is before the court; and such order may require any such person or agency to make periodic reports to the court containing such information as the court in its discretion may prescribe.

Florida Statute § 39.703 provides, in relevant part:

(1) If, in preparation for any judicial review hearing under this chapter, it is the opinion of the social service agency that the parents of the child have not complied with their responsibilities as specified in the written case plan although able to do so, the department shall state its intent to initiate proceedings to terminate parental rights, unless the social service agency can demonstrate to the court that such a recommendation would not be in the child's best interests . . .

Florida Statute § 39.802 provides, in relevant part:

(1) All proceedings seeking an adjudication to terminate parental rights pursuant to this chapter must be initiated by the filing of an original petition by the department, the guardian ad litem, or any other person who has knowledge of the facts alleged or is informed of them and believes that they are true . . .

Florida Statute § 402.72 provides, in relevant part:

(1) The Department of Children and Family Services shall take steps to ensure that department contracts are negotiated in a manner that assures that the state's interests are well represented. In order to make this assurance, the department must request voluntary assistance from outside entities, including, but not limited to, other state agencies, to provide training for departmental employees who negotiate contracts. Further, employees who negotiate contracts must have available to them other department employees who have expertise in legal and fiscal matters and employees who are especially skilled in conducting contract negotiations to ensure that the interests of the state are well represented . . .

Florida Statute § 402.731 provides, in relevant part:

(1) The Department of Children and Family Services is authorized to create certification programs for its employees and service providers to ensure that only qualified employees and service providers provide client services. The department is authorized to develop rules that include qualifications for certification, including training and testing requirements, continuing education requirements for ongoing

certification, and decertification procedures to be used to determine when an individual no longer meets the qualifications for certification and to implement the decertification of an employee or agent . . .

Florida Statute § 409.145 provides:

(1) The department shall conduct, supervise, and administer a program for dependent children and their families. The services of the department are to be directed toward the following goals:

(a) The prevention of separation of children from their families.

(b) The reunification of families who have had children placed in foster homes or institutions.

(c) The permanent placement of children who cannot be reunited with their families or when reunification would not be in the best interest of the child.

(d) The protection of dependent children or children alleged to be dependent, including provision of emergency and long-term alternate living arrangements.

(e) The transition to self-sufficiency for older children who continue to be in foster care as adolescents.

(2) The following dependent children shall be subject to the protection, care, guidance, and supervision of the department or any duly licensed public or private agency:

(a) Any child who has been temporarily or permanently taken from the custody of the parents, custodians, or guardians in accordance with those provisions in chapter 39 that relate to dependent children.

(b) Any child who is in need of the protective supervision of the department as determined by intake or by

the court in accordance with those provisions of chapter 39 that relate to dependent children.

(c) Any child who is voluntarily placed, with the written consent of the parents or guardians, in the department's foster care program or the foster care program of a licensed private agency.

(3) The circuit courts exercising juvenile jurisdiction in the various counties of this state shall cooperate with the department and its employees in carrying out the purposes and intent of this chapter.

(4) The department is authorized to accept children on a permanent placement basis by order of a court of competent jurisdiction for the single purpose of adoption placement of these children. The department is authorized to provide the necessary services to place these children ordered to the department on a permanent placement basis for adoption.

(5) Any funds appropriated by counties for child welfare services may be matched by state and federal funds, such funds to be utilized by the department for the benefit of children in those counties.

(6) Whenever any child is placed under the protection, care, and guidance of the department or a duly licensed public or private agency, or as soon thereafter as is practicable, the department or agency, as the case may be, shall endeavor to obtain such information concerning the family medical history of the child and the natural parents as is available or readily obtainable. This information shall be kept on file by the department or agency for possible future use as provided in ss. 63.082 and 63.162 or as may be otherwise provided by law.

(7) Whenever any child is placed by the department in a shelter home, foster home, or other residential placement, the department shall make available to the operator of the shelter home, foster home, other residential placement, or other caretaker as soon thereafter as is practicable, all relevant information concerning the child's demographic, social, and medical history.

Florida Statute § 409.175 provides, in relevant part:

(4)(a) A person, family foster home, or residential child-caring agency shall not receive a child for continuing full-time care or custody unless such person, home, or agency has first procured a license from the department to provide such care . . .

(2)

Supreme Court, U.S.
FILED
SEP 30 2003
OFFICE OF THE CLERK

No. 03-351

In The
Supreme Court of the United States
October Term, 2003

REGGIE AND REBECCA C., ET AL.,
Petitioners,

v.

JEB BUSH, ET AL.,
Respondents.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

CHARLES J. CRIST, JR.
Attorney General of Florida

JASON VAIL
Assistant Attorney General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399
(850) 414-3300

CHRISTOPHER M. KISE
Solicitor General of Florida
Counsel of Record
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399
(850) 414-3300

115 pp

QUESTION PRESENTED

The respondents submit the question presented is more accurately stated as follows:

> Whether the court of appeals' affirmance of the district court's decision to abstain under the *Younger* doctrine was improper where the defendants are executive branch officials whose actions with respect to children in foster care are subject to the control and oversight of state courts.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

The Amended Complaint 2
The Role of the Florida State Courts in the Care and Protection of Foster Children 4
The District Court's Decision 11
The Court of Appeals' Decision 12

REASONS FOR DENYING THE PETITION 14

I. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT. 14

II. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THE COURTS OF OTHER CIRCUITS, NOR IS THERE A SPLIT AMONG THE CIRCUITS ON YOUNGER ABSTENTION. 19

CONCLUSION 26

APPENDIX

TABLE OF AUTHORITIES

CASES

31 Foster Children v. Bush, 329 F.3d 1255 (11th Cir. 2003) ..... *passim*

A.G. v. Department of Children and Family Servs., 721 So. 2d 414 (Fla. 4th DCA 1998) 8

Bonnie L. v. Bush, 180 F. Supp. 2d 1321 (S.D. Fla. 2001) 1,11

Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) 16

Crawley v. Hamilton County Comm'rs, 744 F.2d 28 (1984) 24,25

Deakins v. Monaghan, 484 U.S. 193 (1988) 16

Department of Children and Family Servs. v. I.C., 742 So. 2d 401 (Fla. 4th DCA 1999) 10,11

Division of Family Servs. v. S.R., 328 So. 2d 270 (Fla. 1st DCA 1976) 9

Division of Family Servs. v. State, 319 So. 2d 72 (Fla. 1st DCA 1975) 9

Green v. City of Tucson, 255 F.3d 1086 (9th Cir. 2001) 22,25

Henry & Rilla White Foundation, Inc. v. Migdal, 720 So. 2d 568 (Fla. 4th DCA 1998) 6,10

In the Interest of L.W., 615 So. 2d 834 (Fla. 1st DCA 1993) 8

J.B. v. Valdez, 186 F.3d 1280 (10th Cir. 1999) 19,22,25

Joseph A. v. Ingram, 275 F.3d 1253 (10th Cir. 2002) 19,20,22,25

L.H. v. Jamieson, 643 F.2d 1351 (9th Cir. 1981) ... 19,20,22

Marks v. Stinson, 19 F.3d 873 (3d Cir. 1994) 23,25

Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423 (1982).] 11,13,24

New Orleans Pub. Serv. Inc. v. Council of the City of New Orleans, 491 U.S. 350 (1989) 16

Quackenbush v. Allstate Insurance Co., 517 U.S. 706 (1996) 15,16

Samuels v. Mackell, 401 U.S. 66 (1971) 16

State v. Brooke, 573 So. 2d 363 (Fla. 1st DCA 1991) .. 6,10

Unum Life Ins. Co. of Am. v. Ward, 526 U.S. 358 (1999) 17

Younger v. Harris, 410 U.S. 37 (1971) ..... *passim*

STATE STATUTES

Fla. Stat. § 30.031 8

Fla. Stat. § 39.01 6

Fla. Stat. § 39.001 5,6

Fla. Stat. § 39.013 4,5,6

Fla. Stat. § 39.407 8

Fla. Stat. §§ 39.501-39.510 5

Fla. Stat. § 39.503 7

Fla. Stat. § 39.521 6,7,8

Fla. Stat. §§ 39.601-39.603 6,7,11

Fla. Stat. § 39.701 7,8,11

Fla. Stat. § 39.621 8

Fla. Stat. §§ 39.801-39.817 8

Fla. Stat. § 39.811 10

Fla. Stat. § 39.4085 5,6

STATEMENT OF THE CASE

Florida has established a foster care system to provide for the care, safety and protection of children who have been abused, neglected or abandoned by their parents. Florida's state courts have exclusive original jurisdiction over all foster care dependency proceedings. The petition arises from an order dismissing an amended complaint filed by children in the Florida foster care system who claimed their care violated federal constitutional and statutory protections. The district court dismissed the petitioners' constitutional claims (counts 1-3) on Younger[1] abstention grounds and their Adoption and Safe Families Act (ASFA) claim (count 4) on the ground that the Eleventh Amendment barred the claim. The court also dismissed without prejudice petitioners' claims under the Medicaid Act's Early Periodic Screening, Diagnosis, and Treatment (EPSDT) provisions (count 5) and for racial discrimination (count 6) on the ground the 116-page complaint was a shotgun pleading that failed to satisfy the "short and plain statement" requirement of Rule 8, Federal Rules of Civil Procedure.[2]

The petitioners appealed the order only as it applied to counts 1-4. The Eleventh Circuit affirmed the district court, determining that Younger abstention was appropriate for counts 1-3 and that the claim in count 4 was not privately enforceable.[3]

---

[1] Younger v. Harris, 410 U.S. 37 (1971).

[2] Bonnie L. v. Bush, 180 F. Supp. 2d 1321 (S.D. Fla. 2001). Remarkably, petitioners have included only a brief excerpt of the amended complaint in their appendix. Respondents therefore have provided the full text of the amended complaint in the appendix to this brief in opposition.

[3] 31 Foster Children v. Bush, 329 F.3d 1255 (11th Cir. 2003).

The court of appeals reversed as to several plaintiffs for lack of standing, and remanded with directions to dismiss as to them.

The petitioners seek review only of the Eleventh Circuit's decision dealing with counts 1-3 and Younger abstention.

The Amended Complaint

The petitioners filed the initial complaint in June 2000, but the operative document is the amended complaint, filed in August 2000. App. 1-82. The amended complaint was 116 pages long. The prayer for relief alone encompassed two and a half pages. The defendants are the Florida Governor, the Secretary of the Florida Department of Children and Families ("DCF") (which administers the foster care system), and a number of administrators of regional administrative districts within the department.

The petitioners pleaded the case as a class action, App. 36, ¶¶ 117 *et seq.*, asserting the following claims:

1. In Count 1 the petitioners claimed the defendants violated their substantive due process rights under the Fourteenth Amendment by failing to meet their basic needs for food, clothing, shelter, medical care, education, and safety; failing to protect them from unnecessary harm, injury, or deterioration; failing to find homes for them and keeping them in state custody too long; improperly permitting the use of drugs for non-medical reasons; and failing to provide them with "appropriate care." App. 71, ¶ 221.

2. Count 2 alleged violations of procedural due process. The petitioners claimed that the defendants violated their Fourteenth Amendment procedural due process rights by denying them, without notice and opportunity for hearing, the rights to periodic visits by caseworkers; prompt medical care; the right to file a petition to seek post-foster care support and services; and the

right to be present in court at periodic reviews of their cases by the state dependency court. App. 72, ¶ 222.

3. Count 3 presented claims under the First, Ninth, and Fourteenth Amendments. Petitioners alleged the unnecessary and unreasonable separation from siblings in foster care and the denial of visitation with siblings in foster care. App. 72, ¶ 223.

4. Count 4 was based on The Adoption and Safe Families Act. Petitioners alleged a right to compel the defendants to begin proceedings to terminate parental rights when a petitioner has been in state custody for 15 of the most recent 22 months; the right to have the defendants offer the petitioner's biological family services necessary for reunification with the petitioner; and the right to obtain education and health information. App. 73, ¶ 224.

5. In Count 5 petitioners sought relief for alleged violations of requirements under the Early, Periodic Screening, Diagnostic, and Treatment program, which is part of the Medicaid program. They claimed rights to receive periodic general physical health examinations; periodic dental, hearing and eye examinations; childhood vaccinations and boosters; and all necessary medical treatment. App. 74, ¶ 225.

6. In Count 6 one petitioner, Tammy G., alleged racial discrimination under Title VI of the Civil Rights Act of 1964. App. 74, ¶ 226.

In the Prayer for Relief petitioners first sought a declaration that the defendants' actions violated the Constitution and federal statutory law. App. 75, ¶ C.

Second, the petitioners demanded specific injunctive relief targeted at any violations of federal law affecting them personally and as class representatives. App. 76, ¶ D.

Third, they demanded "appropriate remedial relief to ensure Defendants' future compliance with the Constitution and laws of

the United States and their provision of legally mandated services and proceedings." App. 76, ¶ E.

Fourth, the petitioners sought "appointment of an expert panel . . . to oversee the implementation of a plan of reform, which will ensure that Defendants protect the federal constitutional and statutory rights of Plaintiffs and the members of the class they seek to represent." App. 76, ¶ F. Presumably, the oversight panel would answer to the district court in fashioning this relief, which the court would impose.

Fifth, petitioner sought the appointment of an "ombudsman or children's advocate to present the interests of Plaintiffs and their putative class members to Defendants and DCF, to whom all children in Florida foster care will have open and confidential access and with whom Defendants or their designees with authority to make decisions on Defendants' behalf will meet regularly and frequently to attempt to resolve issues that affect individual or groups of similarly situated foster children." App. 76, ¶ G.

The Role of the Florida State Courts in the Care and Protection of Foster Children

Critical to understanding this Younger abstention case is the role state dependency courts play in the lives of Florida foster children. Both the district and circuit courts took into consideration how Florida law defines that role in rendering their opinions.

Florida, like other states and the District of Columbia, takes care of children who have been abused, neglected or abandoned by their parents. Fla. Stat. Ch. 39. Children become wards of the court when they enter public custody upon an allegation of abuse, neglect or abandonment. Fla. Stat. § 39.013(2). They enter foster care upon the filing of a petition of dependency, a

hearing, and findings by the state circuit court. Fla. Stat. §§ 39.501-39.510. The purpose of such a proceeding is the protection of the child. Fla. Stat. § 39.501(2).

Children remain wards of the court until they are no longer dependent or until they become adults upon their 18th birthday. Fla. Stat. § 39.013(2) ("The circuit court shall have exclusive original jurisdiction of all proceedings under this chapter. . . When the court obtains jurisdiction of any child who has been found to be dependent, the court shall retain jurisdiction, unless relinquished by its order, until the child reaches 18 years of age.").

The objective of the Florida foster care system is:

> To provide for the care, safety and protection of children in an environment that fosters healthy social, emotional, intellectual, and physical development; to ensure secure and safe custody; and to promote the health and well-being of all children under the state's care.

Fla. Stat. § 39.001(1)(a).

The child's health and safety are the "paramount concern." Fla. Stat. § 39.001(1)(b)(1). One of the objectives of judicial supervision is to ensure that a foster child receives "the most stable and potentially permanent living arrangement for the child, as determined by the court." Fla. Stat. § 39.001(1)(i). See also Fla. Stat. § 39.001(3) (purpose is to provide a safe, permanent and stable home for children), and § 39.4085 (establishing a broad range of goals for the foster care system). The goals of the foster care system include the protection of children's health and safety, provision of necessary services, placement in a home with no more than one other child unless placed with siblings and not in a home where other children pose a threat, monthly contacts with a caseworker, involvement in the development of his or her case plan, placement in a home where the foster parent

understands his or her needs, regular visits with siblings unless the court orders otherwise, and a free and appropriate education. Fla. Stat. § 39.4085(7)-(11), (14), (15), (17). Yet another goal is to see that children are placed with their siblings whenever possible. Fla. Stat. § 39.001(1)(k).

Florida gives the state circuit courts primary responsibility for assuring appropriate care for foster children. State v. Brooke, 573 So. 2d 363, 369 (Fla. 1st DCA 1991); Fla. Stat. § 39.521(1)(b)(3). As the court said in Henry & Rilla White Foundation, Inc. v. Migdal, 720 So. 2d 568 (Fla. 4th DCA 1998):

> Chapter 39 gives a circuit judge the power to control and regulate a child's case from the time jurisdiction attaches until after the child passes the age of eighteen. A child's safety is a proper concern of the court at all stages of the court's jurisdiction. . . .
>
> The provisions of Chapter 39 provide a juvenile court judge the flexibility to factor a child's safety into a custody decision at all stages of a juvenile proceeding.

Id. at 571, 573. The state court is required to give priority to foster care matters over other cases. Fla. Stat. § 39.013(6).

Florida courts oversee the foster child's welfare through the child's "case plan." Fla. Stat. §§ 39.601-39.603. Each child is required to have a case plan. Fla. Stat. §§ 39.521(1)(a), 39.601(1), (9). A case plan "means a document, as described in § 39.601, prepared by the department with input from all parties. The case plan follows the child from the provision of voluntary services through any dependency, foster care, or termination of parental rights proceeding or related activity or process." Fla. Stat. § 39.01(11). Among other things, the case plan addresses services a child needs and will receive, the

permanency/placement goal, the type of home or other place where the child will live, visitation, and education. The plan also contains a discussion of the safety and appropriateness of the proposed placement or foster home. Fla. Stat. § 39.601(3). For example, the case plan addresses special conditions affecting the child, evaluations, counseling, treatment, and the individuals responsible for monitoring the provision of services. Fla. Stat. § 39.521(1)(d). Central to the case plan is the appropriateness and safety of the child's placement. Fla. Stat. § 39.601(3)(e).

The dependency court determines the child's most appropriate placement through the case plan. Fla. Stat. § 39.521(3). If the child's goal is adoption or other long term placement, the case plan must include a description of adoptive family recruitment efforts. Fla. Stat. § 39.601(3)(l). The court may order DCF to conduct a search for relatives who might take a foster child. Fla. Stat. §§ 39.503(5), (6), 39.521(1)(d)(8).

The case plan is filed with the court. Fla. Stat. § 39.601(6), (9). The court must approve the case plan. Fla. Stat. § 39.603. If the court finds that the plan is inadequate, it can reject the plan and require amendments. Fla. Stat. § 39.603(2).

The court's participation in foster care is not limited to one-time approval of the case plan. Rather, the court's involvement is continuous once a child is declared dependent. The court has continuing jurisdiction over the child and must conduct a review of the child's situation at least once every six months. Fla. Stat. § 39.701(1), (2).

These judicial reviews must start within 90 days after a declaration of dependency or first approval of the case plan. Fla. Stat. § 39.701(3)(a). Notice of judicial review hearings goes to the foster parents or other custodian, DCF, and to any person the court may order. Fla. Stat. § 39.701(5). The court may dispense with the child's attendance at the review hearing. Fla. Stat. § 39.701(2)(a). For instance, the child may be too young to

participate meaningfully, or the hearing may require the child be taken out of school.

At a judicial review hearing, the court considers the child's entire situation, including compliance with the case plan and the appropriateness of the current placement. Fla. Stat. § 39.701(7)(a)-(i). DCF must report on its efforts to comply with the case plan. Fla. Stat. § 39.701(6)(a). The court can extend the time limitation on the plan or modify its terms. Fla. Stat. § 39.701(8)(d). The case plan is, in effect, a judicial order, which the court can enforce using its contempt power. Fla. Stat. § 39.701(8)(c). In addition, the court has broad powers to direct the behavior of any of the parties. Fla. Stat. § 39.701(8)(g).

The state court must expedite placement decisions when a child is removed from a parent. Fla. Stat. § 30.031(5). The state court is responsible for deciding who will have custody of a child. Fla. Stat. § 39.521(3). The court is also responsible for deciding the child's "permanency goal," that is, whether to pursue adoption or some other arrangement that is in the child's best interests. Fla. Stat. § 39.621. The court also must conduct a permanency hearing within 12 months of the time the child entered public custody. Fla. Stat. § 39.701(8)(f). The decision whether to terminate parental rights is also a matter for the court. Fla. Stat. §§ 39.801-39.817.

The Florida appellate courts have held that the state court's powers to carry out its responsibility toward Florida children are broad. For example, the state court may require that children receive necessary services. See, e.g., A.G. v. Department of Children and Family Servs., 721 So. 2d 414, 417 (Fla. 4th DCA 1998) (court may require a child to undergo psychological evaluation). See also Fla. Stat. § 39.407(3) (empowering the court to order mental and physical evaluations and treatment).

The breadth of a state dependency court's authority in superintending the safety, care and services provided to foster

children is reflected in In the Interest of L.W., 615 So. 2d 834 (Fla. 1st DCA 1993). The court said:

> Where the court receives evidence that [DCF] is not complying with its duties and that the child is not being afforded the services and protections which the legislature expressly provided, then the trial court can act and order the Department to submit a plan which provides those services and will promote the child's adoptive placement. . . . That authority is not limited to advisory comments that the Department is not doing its job of protecting and providing for the welfare of this child. The court has the authority to require the Department to develop specific plans to accomplish the goal of adoption. Further, the court may order placement of the child in a therapeutic setting.

Id. at 838-39. Among other things, this means that if a child needs a specific type of treatment or placement, the state court can order that it be provided. Thus, while the state court may not be able to dictate what particular doctor a child sees for an ailment, the state court has the power to see that the child receives appropriate, targeted medical care.

The state dependency court can order DCF to place siblings together in the same foster home, and can cite the agency for contempt if it fails to comply. Division of Family Servs. v. State, 319 So. 2d 72 (Fla. 1st DCA 1975); Division of Family Servs. v. S.R., 328 So. 2d 270, 271 (Fla. 1st DCA 1976) (approving order requiring placement of five siblings in same foster home).[4]

---

[4] "The Court had authority to direct the Division to place the five children in the same foster home located in Northeast Florida. Keeping the five children together is the intent and goal of Chapter 39, Florida Statutes. The Court has authority under Chapter 39 to impose

If siblings are separated, the court has the authority to require continued contact between them. Fla. Stat. § 39.811(7)(a).

If the state court becomes concerned about the safety of any placement or about the potentially harmful impact of any DCF practice on the child's welfare, the circuit court has the power to order the child's representative to investigate and can take remedial action. Henry & Rilla White Foundation, Inc. v. Migdal, 720 So. 2d at 574. The court may also conduct its own investigation and require information and periodic reports from the department. Department of Children and Family Servs. v. I.C., 742 So. 2d 401 (Fla. 4th DCA 1999). The only caveat is that the court must confine its investigation and remedial actions to the children who are within its jurisdiction as a result of dependency cases. Id. While the court may not order a child placed in a particular facility, it has the inherent power to fashion such orders as are necessary to ensure the child's welfare is protected. Henry & Rilla White Foundation, Inc. v. Migdal, 720 So. 2d at 573 (stating "a circuit court has 'inherent and continuing jurisdiction to entertain matters pertaining to child custody and to enter any order appropriate to a child's welfare,'" and holding that court could fashion an order avoiding child's placement in a troubled facility); Department of Children and Family Servs. v. I.C., 742 So. 2d at 405 (same); State v. Brooke, 573 So. 2d 363, 368-369 (Fla. 1st DCA 1991) (trial court cannot tell the department where to place a child but can place limits on the department's discretion).

The state court's remedial powers include the power to issue injunctions to carry out its responsibilities to protect foster children. See, e.g., Department of Children and Family Servs. v.

---

reasonable conditions and restrictions in custodial orders entered after an adjudicatory hearing. The conditions and restrictions imposed by the order before us are reasonable and did not infringe upon the authority of the Division." 328 So. 2d at 271.

I.C., 742 So. 2d at 405 (not disapproving fact state dependency court issued an injunction, only that it did so relying on information acquired outside the judicial process).

In short, if the court finds that officials are not acting in the child's best interests, it can require them to draw up plans to do so, can require them to amend the case plan to put those plans into effect, and can find officials in contempt if they do not obey. Fla. Stat. §§ 39.603(2), 39.701(8)(c), 39.701(8)(g).

The District Court's Decision

Faced with this statutory scheme, the district court determined that it must abstain under Younger and dismissed Counts 1-3. Bonnie L., 180 F. Supp. 2d at 1331-1338.[5] The district court rejected the petitioners' arguments that the state court's role in the management of the lives of foster children was limited. Id. at 1334-1335. The court found that once a foster child is in foster care, she "is under the jurisdiction of the dependency court . . ." Id. at 1335. The district court said, "There is no point in this process [foster care review by the state dependency court] where actions of the Department concerning any child are beyond the review of the state court. Any order of this Court, therefore, has the potential for an unseemly conflict between a state judge and this Federal Court." Id. "The plaintiffs cannot argue that the first Middlesex[6] prong requiring an ongoing state judicial proceeding is not met due to the retention of jurisdiction and periodic judicial review once the case plan has been approved by the court." Id.

---

[5] Although a magistrate judge recommended certifying a class, the district court did not do so.

[6] Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423 (1982).

The trial court did not dismiss on Younger grounds the constitutional claims of plaintiffs who were at least 18 years old (who are not petitioners here) and who sought post-foster care services, because as adults they are not subject to state dependency court supervision.

The district court dismissed the remaining claims on other grounds. The court concluded that count 4, the ASFA claim, was barred by the Eleventh Amendment. The court dismissed the claims of the post-foster care plaintiffs and counts 5 (EPDST) and 6 (racial discrimination) because of the petitioners' failure to meet the "plain statement" requirement of Rule 8, Federal Rules of Civil Procedure. The court found the amended complaint, a massive 116-page document, was a "shotgun" pleading that read in large part like a "closing argument" and contained a "sprawling exposition" of allegations which failed properly to identify the issues, imperiling the court's ability to dispense justice. Id. at 1348.

The district court allowed petitioners an opportunity to refile counts 5 and 6, and allowed the post-foster care children to refile their constitutional claims. Id. at 1349-1350. These claims were not further pursued. The court noted standing problems, but did not rule on them. Id. at 1350.

The Court of Appeals' Decision

Twenty-two plaintiffs appealed. 31 Foster Children, 329 F.3d at 1261 n. 1. The number of plaintiffs declined because some of them settled. Id. at 1262.

The Eleventh Circuit affirmed dismissal of the ASFA claim in count 4 on the ground there was no private right of action. The court also found that several plaintiffs lacked standing and remanded with instructions to dismiss as to these plaintiffs. Id. at 1282.

On the abstention question, the court applied the Middlesex factors and concluded that any relief the district court might grant would interfere with ongoing state dependency proceedings. The court reviewed at length the statutes and case law spelling out the powers, duties, and responsibilities of state dependency courts toward foster children and found that "[t]he state trial level courts of Florida play a critically important role in dependency hearings from the outset of a child's case." Id. at 1277-78. The core document governing a child's life, the court found, was the "case plan," which "must include, among other items, a description of the permanency goal for the child, a description of the type of home or institution in which the child is to be placed, a discussion of the safety and appropriateness of the child's placement, the services that the child needs and will receive, a description of the visitation rights of the parents, and a description of the efforts to be undertaken to maintain the stability of the child's education." Id.

The court found that the state court approves the case plan and could amend it on its own motion. Id. Subsequent periodic review of a child's situation included a review of the case plan, (which addressed the child's educational, medical and psychological needs) appropriateness of the current placement, and more. After 12 months, the court noted, the state dependency court must conduct a judicial review to determine the plan for the child's permanent placement. If the child is not returned to his or her parents, a plan must be put in motion to find an adoptive parent or some other permanent living arrangement. Id. at 1278.

This extensive statutory analysis led the court of appeals to conclude:

> In this case the plaintiffs are seeking relief that would interfere with the ongoing state dependency proceedings by placing decisions that are now in the hands of the state courts under the

> direction of the federal district court. The declaratory judgment and injunction that they request would interfere with the state proceedings in numerous ways. The federal and state courts could well differ, issue conflicting orders about what is best for a particular plaintiff, such as whether a particular placement is safe or appropriate or whether sufficient efforts are being made to find an adoptive family.

Id. at 1278.

The court of appeals also observed that the appointment of a panel of experts, which the plaintiffs demanded, to "revamp and reform dependency proceedings in Florida," would take "the responsibility for a state's child dependency proceedings away from state courts and [put] it under federal court control." Id. at 1279. This amounts to "federal court oversight of state court operations" sufficient to trigger the need for Younger abstention. Id.

Finding that the state dependency courts provided an adequate remedy for their constitutional claims, the Eleventh Circuit held that Younger abstention was warranted for counts 1-3. Id. at 1279-1281.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT.

The petitioners mistakenly contend that the abstention doctrine first articulated in Younger v. Harris, 410 U.S. 37 (1971), is proper in only one situation — when the relief requested directly targets an ongoing state proceeding. This

Court's rationale for Younger abstention is not so rigid nor circumscribed as to prohibit the application of the doctrine to the facts of this case. Nor are the holdings of its Younger cases so limited. No case from this Court conflicts — directly or indirectly — with the holding of the court of appeals.

The Younger doctrine rests on three considerations. First is the notion that state courts should be able "to try state cases free from federal interference." Id. at 43.

Second is the equity principle "that courts of equity should not act, and particularly should not act to restrain [a state action], when the moving party has an adequate remedy at law and will not suffer irreparable harm." Id. Thus, if the federal litigant has an opportunity to raise his or her federal claims in the state proceeding and obtain an adequate remedy, this equity doctrine counsels federal courts to refrain from issuing an injunction that might interfere with the state proceeding.

Third is the powerful notion of comity, an "even more vital consideration" than equity concerns. Id. at 44. Comity — and federalism — manifest

> a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. . . . What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id. at 44. See also Quackenbush v. Allstate Insurance Co., 517 U.S. 706, 718-19 (1996).

The Younger Court held that under these principles abstention is "the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts." 410 U.S. at 45. Even though the federal courts' obligation to adjudicate federal claims is generally "unflagging," Deakins v. Monaghan, 484 U.S. 193, 203 (1988), this Court has explicitly held that, "[w]here a case is properly within this category of cases [warranting abstention], there is no discretion to grant injunctive relief." Colorado River Water Conservation District v. United States, 424 U.S. 800, 816 n. 22 (1976).

Although this Court views abstention as appropriate only in a narrow band of cases, New Orleans Pub. Serv. Inc. v. Council of the City of New Orleans, 491 U.S. 350, 359 (1989), within that narrow band this Court has never indicated Younger abstention applies only to specifically enumerated types of cases or to specific fact patterns. Indeed, the Court has said that "the various types of abstention cases are not rigid pigeonholes into which federal courts must try to fit cases." Id. at 359. Thus, flexible rather than dogmatic application of the Younger rule is appropriate, for no one can predict what fact pattern may arise in which Younger can and should come into play.

In a similar vein, this Court's approach to Younger has not dogmatically limited its application to cases in which injunctive relief is the only matter at issue. In Younger, this Court said that a federal action for declaratory relief may sufficiently interfere with a state court proceeding to justify abstention. Id. at 41 n. 2. The Court reenforced this holding in Samuels v. Mackell, 401 U.S. 66 (1971), wherein it ruled that a federal action for declaratory relief that has the "practical impact" of an injunction which interferes with a state court proceeding warrants Younger abstention. Samuels, 401 U.S. at 72. See also Quackenbush, 517 U.S. at 706.

Thus, under this Court's decisions, a federal court must determine if the relief proposed, regardless of its actual nature,

has the "practical impact" of an injunction which interferes with a state court proceeding. This formulation does not accommodate a bright line test, as the petitioners suggest. Rather, it necessarily requires a careful weighing of all the facts and circumstances in light of the rationale for Younger abstention, with due regard for federalism and comity concerns. The court of appeals performed that careful analysis and properly determined that, given the facts and circumstances, the district court did not abuse its discretion in finding the relief requested interfered with state dependency proceedings.

The relief petitioners sought in their complaint is not the same as reflected in their petition. In their petition, they contend they asked only for "systemic" relief. Petition at 21. In fact, the amended complaint complained of dangerous and inappropriate placements; placement in temporary shelters instead of foster homes; multiple, unwarranted placements in strings of different foster homes; the denial of the right to medical care without notice and hearing; and unjustified separation from siblings and the denial of visitation with separated siblings. App. 71, ¶ 221; See also 31 Foster Children v. Bush, 329 F.3d at 1264.

The petitioners sought injunctive as well as declaratory relief targeted to these precise alleged harms. App. 75-76, ¶¶ C and D. The appropriateness of placements (whether they are safe, where they are, what kind they are, how often they are changed), whether a child receives medical care, and whether a child continues to live with siblings or has visitation rights if separated, are all matters ultimately decided by state dependency courts, not executive branch officials, as a matter of Florida law. 31 Foster Children v. Bush, 329 F.3d at 1277-78. Ordinarily, this Court does not disturb an appeals court's judgment on an issue so heavily dependent on a reading of state law. Unum Life Ins. Co. of Am. v. Ward, 526 U.S. 358, 368 (1999).

The relief sought here is personal to the individual plaintiffs and asks the federal court to make findings about the

appropriateness of their placements and medical care and to order changes — changes that will necessarily be at odds with decisions of the state dependency court which approved the placements, the medical care, or the separations from siblings. The requested relief thus has the practical effect of an injunction directed squarely at the state dependency courts.

Concerning "systemic" relief, the petitioners prayed for the appointment of a panel of experts "to develop and oversee the implementation of a plan for reform, which will ensure that Defendants protect the federal constitutional and statutory rights of Plaintiffs." App. 76, ¶ F. Logically, this panel would report to the district judge. The suggestion, if adopted, would amount to a federal judicial takeover of the Florida foster care system through the oversight panel. The petitioners proposed no limits to the power of this panel to dictate and oversee these "reforms." It takes little imagination to realize that the work of this panel will collide with decisions of state dependency courts in individual cases, a consequence the court of appeals plainly understood. 31 Foster Children v. Bush, 329 F.3d at 1278.[7]

Finally, it is apparent the facts in Younger are similar to the facts in this case. In Younger, the plaintiff sued an executive branch official — a state prosecutor — and sought to interfere with his activities in state court. In our case, the relief requested

---

[7] The petitioners also demanded the appointment of an "ombudsman." The ombudsman's charge was ill-defined and broad: "to attempt to resolve issues that affect individuals or groups of similarly situated foster children." App. 76, ¶ G. The petitioners complain that the court of appeals misunderstood what they sought because the court referred to the expert panel as 'a permanent children's advocate,'" evidently implying that the court confused the ombudsman with the expert panel. Petition at 20. While the court may have called the expert panel an "advocate" instead of a panel, it understood what they wanted and understood the distinction between the panel and the ombudsman. 31 Foster Children, 329 F.3d at 1262.

by the plaintiffs targets the activities of executive branch officials whose representatives must appear before state dependency courts when those courts make determinations about the placements of foster children, their education, their health care, their visitation rights with siblings — indeed, all facets of their lives. Both the district and circuit courts found the requested relief would impede the working of state dependency courts, which are ultimately responsible under Florida law for the care of foster children.

Thus, the decisions of this Court do not conflict with the decisions below, but rather are consistent with this Court's pronouncements on Younger abstention.

II. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THE COURTS OF OTHER CIRCUITS, NOR IS THERE A SPLIT AMONG THE CIRCUITS ON YOUNGER ABSTENTION.

The second ground the petitioners contend warrants granting the writ is a conflict among the circuits. The decisions they rely on demonstrate no such conflict.

The petitioners claim the decision below and two others — Joseph A. v. Ingram, 275 F.3d 1253 (10th Cir. 2002), and J.B. v. Valdez, 186 F.3d 1280 (10th Cir. 1999) — are "at odds" with L.H. v. Jamieson, 643 F.2d 1351 (9th Cir. 1981). Petition at 27.

The present case is not at odds with Jamieson. The facts of the two cases are markedly different. In Jamieson, the plaintiffs were children in Arizona's foster care system. Like our plaintiffs, they were subject to the ongoing jurisdiction and supervision of the state dependency court, but that is the only point of congruence. The two cases differ significantly in the

kind of relief requested. The Jamieson plaintiffs demanded that the federal court order "additional funding to private agencies that care for children in the state's custody." Id. at 1352. That is, they sought only one narrow kind of relief — additional state funds for foster care, to be paid to private providers.

Because the Jamieson plaintiffs only sought additional money from the state "to reimburse private child-caring agencies for their full cost of their care," the court concluded that the relief did not affect an ongoing state proceeding and thus Younger abstention was inappropriate. Id. at 1354-55. Unlike the relief sought by the petitioners in the present case, an order requiring the state defendants to pay money to private caretakers would not have affected the ability of any state court to adjudicate a dependency proceeding.

In contrast, the petitioners here sought specific relief targeted toward specific claims of dangerous and inappropriate placements, denied medical care, and separations from siblings. 31 Foster Children v. Bush, 329 F.3d at 1264. As the court of appeals correctly noted, this relief "would interfere with ongoing state dependency proceedings by placing decisions that are now in the hands of the state courts under the direction of the federal district court." 31 Foster Children v. Bush, 329 F.3d at 1278. Thus, Jamieson is not analogous to the present case.

Nor does Jamieson conflict with Joseph A., because the facts of the cases are different. Joseph A. was a class action filed by children in foster care in New Mexico. The parties entered into a consent decree and later agreed to a "Stipulated Exit Plan," or SEP. 275 F.3d. at 1258. The SEP required many things, including training caseworkers, conducting assessments, dictating the contents of treatment plans (which prohibited recommending certain courses of action), and filing actions to terminate parental rights within tight time frames. Id. The defendants challenged further enforcement of the SEP.

The Tenth Circuit concluded that Younger abstention could well be applicable to at least some of the provisions of the SEP. The court identified some provisions it thought were problematic — primarily those that inhibited the discretion of defendants' attorneys from presenting choices and recommendations to the dependency court for its ultimate decision.

> Enforcement of the SEP, however, requires interference with the operations of the Children's Court in an insidious way in that the SEP expressly prevents the Department's employees from recommending a range of planning options for children who are in the Department's custody. This limitation has an effect not unlike that of an injunction or declaratory judgment because the Department is precluded ever from presenting certain options to the Children's court. Therefore, the state court is, for all practical purposes, precluded from considering these options.
>
> * * *
>
> A federal court's enforcement of a decree that bars an attorney from acting as an independent advocate for an outcome he or she believes is appropriate similarly interferes with the operations of a state court.

Id. at 1268-69.

The Tenth Circuit, however, stopped short of deciding which aspects of the SEP in fact warranted Younger abstention. Instead, the court remanded the case to the district court for such a provision-by-provision determination. Id. at 1274. (In this sense, the Tenth Circuit's Younger discussion was not strictly a holding but more advisory to the district court.)

Thus, like this case, Joseph A. resembles Younger more than Jamieson because the relief imposed in Joseph A. inhibited the actions of attorneys in a state trial proceeding.

J.B. v. Valdez also does not conflict with Jamieson because the relief in Valdez, the Tenth Circuit concluded, would have put the federal court in "an oversight role over the entire state program for children with disabilities." 186 F.3d at 1291-92. Valdez involved a challenge by children with mental and developmental disabilities to their care and treatment while in state custody. They sought relief for "systemic failures." Id. at 1289. Like the children in the present case, the Valdez plaintiffs were subject to the ongoing control of the state's children's courts, which the Tenth Circuit concluded constituted ongoing state judicial proceedings. Id. at 1291. In the Tenth Circuit's analysis, the relief the plaintiffs sought "places the federal court in the role of making dispositional decisions such as whether to return the child to his parents in conjunction with state assistance or whether to modify a treatment plan. These are the kinds of decisions currently made by the New Mexico Children's Court through the periodic review process." Id. at 1292.

Thus, the relief sought in Valdez would have injected the federal court into the state judicial process in a way the Jamieson relief clearly did not. There is no conflict here.

The plaintiffs also point to a perceived conflict between the Eleventh and Tenth Circuit cases and decisions from the Third, Sixth, and Ninth Circuits. However, the conflict they perceive is more phantom than real since the Third, Sixth, and Ninth circuit cases do not involve children in foster care.

Green v. City of Tucson, 255 F.3d 1086 (9th Cir. 2001), involved two lawsuits, one state and the other federal, challenging the constitutionality of an Arizona statute regulating the incorporation of cities around the perimeter of Tucson. This was a classic case of parallel litigation, as the plaintiffs in the two suits were different. Only the defendant, Tucson, was the

same in both cases.[8] The case was not about direct or indirect interference, as the petitioners suggest, but about whether litigation in the federal court, brought by individuals who were not parties to the state proceeding, would "enjoin, declare invalid, or otherwise involve the federal courts in terminating or truncating the state court proceedings." Id. at 1098. Under the specific facts of that case, the Ninth Circuit saw no interference with the state proceeding, and hence no reason for Younger abstention.

Marks v. Stinson, 19 F.3d 873 (3d Cir. 1994), involved a lawsuit by Marks, the losing candidate in a Pennsylvania state senate race who claimed election fraud. Marks filed two actions in state court to overturn the result. When the state cases had been pending for four months without any movement, Marks filed his federal action. After the state trial court dismissed his state claims (but while those decisions were on appeal), federal defendant Stinson asked the district court to abstain. The district court refused to abstain on two grounds. First, it concluded that the state remedy would be inadequate even after the conclusion of the state appeal. Id. at 884.[9] Second, it believed that the federal relief requested "did not involve any restraint, direct or indirect, on the state's judicial process." Id. The district court went on to declare the election unconstitutional, and ordered Marks certified as the winner. Id. at 884-85. Given these facts, the court viewed the matter as merely involving parallel litigation in a way that did not implicate Younger. But whether the case involved parallel litigation (the point important to the petitioners)

---

[8] Technically, Tucson was the defendant in a counterclaim in the state case raising the constitutionality of the incorporation scheme.

[9] "Insofar as Younger is concerned, the passage of time here has only served to cast doubt on the adequacy, for these plaintiffs at least, of any remedy the Pennsylvania Supreme Court may find to be available in the Court of Common Pleas." 19 F.3d at 884.

is largely irrelevant. Based on the district court's conclusions, Younger abstention was inappropriate because of the lack of an adequate remedy in state court, one of the three criteria for abstention. See Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 432 (1982).

The petitioners cite Crawley v. Hamilton County Comm'rs, 744 F.2d 28 (1984), in a way that suggests they believe the case holds that Younger abstention is appropriate only when federal plaintiffs try to use the federal court to shield them from an action in state court. Petition at 24.

Crawley, however, does not stand for this narrow proposition. In 1972, inmates at a Cincinnati jail filed a state conditions of confinement lawsuit. The plaintiffs won injunctive relief after a trial. The order included a directive to close the existing facility, which apparently was done, and a new one opened. Id. at 30. The state appeals court affirmed. In 1981, after years of post-judgment enforcement litigation, the case became inactive, and the state plaintiffs and defendants moved to dismiss it. Id. The same plaintiffs brought a federal lawsuit in 1982 again challenging their conditions of confinement but this time apparently at the new facility. Id. It is unclear whether the state relief affected the defendants' conduct at the new facility. Certainly, the requested federal relief affected only the new facility. But even so, the federal district court found Younger abstention appropriate. The Sixth Circuit disagreed and reversed. The court reasoned that the case's procedural posture was too dissimilar from that in Younger to make abstention justified:

> In the typical Younger case, the federal plaintiff is a defendant in ongoing or threatened state court proceedings seeking to enjoin continuation of those state proceedings. Moreover, the basis for the federal relief claimed is generally available to

> the would-be plaintiff as a defense in the state proceedings.

Id. The court distinguished Crawley from the "typical" Younger case because the Crawley plaintiffs in the federal action were also the plaintiffs in the state action and were not trying to use the federal action "to shield them from state court enforcement efforts." Id.

This reasoning and holding do not mean, as the petitioners apparently claim, that the Sixth Circuit has narrowly limited Younger's field of operation. The Sixth Circuit pointedly noted that it looked to the "typical" Younger case as its paradigm, but that does not mean the court would shy away from applying the doctrine in every atypical case, or even one like petitioners present here. Morever, it appears the court additionally concluded that the federal relief would not interfere with the state proceedings since they were, for all intents and purposes, over.

Thus, review of Green, Marks, and Crawley demonstrates they are not so dissimilar in reasoning or result to this case, Joseph A., and Valdez as to constitute a conflict sufficient to warrant granting the writ. Green says abstention is unwarranted when the federal and state plaintiffs are different. Marks and Crawley are at heart plain vanilla Younger decisions, the former turning on the conclusion that the state proceeding failed to provide an adequate remedy, and the latter on the finding that federal relief will not interfere with a state proceeding that was defunct. These cases are far more consistent than they are inconsistent with the Eleventh Circuit's decision in this case.

CONCLUSION

For these reasons, the respondents ask the Court to deny the petition.

RESPECTFULLY SUBMITTED,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

CHRISTOPHER M. KISE
SOLICITOR GENERAL
Fla. Bar. No. 0855545
Counsel of Record

JASON VAIL
Assistant Attorney General
Fla. Bar No. 298824

Office of the Attorney General
Suite PL-01
The Capitol
Tallahassee, FL 32399
(850)414-3300
(850)488-4872 (fax)

APPENDIX

UNITED STATES DISTRICT
SOUTHERN DISTRICT OF FLORIDA

FOSTER CHILDREN BONNIE L., by and through her next friend Donald Hadsock; REGGIE B. and REBECCA B., by and through their next friend Danielle Roussel; LAURIE S. and LILLIE S., by and through their next friend Danielle Roussel; LESLIE F., by and through her next friend Brenda Shapiro; SANDRA M., by and through her next friend Danielle Roussel; TANYA M., by and through her next friend Danielle Roussel; CANDICE D. and JAY D., by and through their next friend Lori A. Haythorn; MATTHEW I., by and through his next friend Danielle Roussel; HUGH S., by and through His next friend Danielle Roussel; LEANNE G. and TAMMY G., by and through their next friend Danielle Roussel; ELAINE R., by and through her next friend Kristi Kassebaum; PAUL B., by and through his next friend Danielle Roussel; RACHEL C., by and through her next friend Danielle Roussel; CATHY W., by and through her next friend Danielle Roussel; LARISSA C., by her next friend, Rhoda Goodson; JOHN J., by and through his next friend Mary Miller; MELINDA and KARINA, by and through their guardian ad litem Brenda Shapiro, on behalf of themselves and all other similarly situated children,

Plaintiffs,

v. CASE NO.: 00-2116
-C.V.-MORENO

JEB BUSH, as Governor of the State of Florida; KATHLEEN KEARNEY, as Secretary of the Florida Department of Children and Families; CHUCK BATES, JOHN AWAD, ESTER TIBBS, LEE JOHNSON, LYNN RICHARD, DON DIXON, ROBERT MORIN, FRAN GIBBONS, PAUL BROWN, CHARLES AUSLANDER, CHRISTINE DAVENPORT, PATRICK HOWARD, SUE GRAY and VERN MARTIN, each as a District Administrator of the Florida Department of Children and Families,

Defendants./

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
CLASS ACTION

A. INTRODUCTORY STATEMENT

1. Plaintiffs, Foster Children, on behalf of themselves and all other children in Florida foster care, sue Defendants Jeb Bush, as Governor of the State of Florida; Kathleen Kearney, as Secretary of the Florida Department of Children and Families [DCA]; and Chuck Bates, John Awad, Ester Tibbs, Lee Johnson, Lynn Richard, Don Dixon, Robert Morin, Fran Gibbons, Paul Brown, Charles Auslander, Christine Davenport, Patrick Howard, Sue Gray and Vern Martin, each as a DCAF District Administrator. [In this paragraph and hereafter, the terms "foster child" and "foster care" are used to include children in Defendants' custody based on either an allegation or an adjudication that the child is abused, neglected, abandoned, surrendered or voluntarily placed with Defendants, and specifically includes foster care, shelter care, independent living and pre-adoptive and adoptive placements]. Plaintiffs allege:

2. This is an action for declaratory and injunctive relief,

brought pursuant to 42 U.S.C. § 1983, for redress from Defendants' acts and omissions in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution; the First and Ninth Amendments to the United States Constitution; provisions of the Adoption and Safe Families Act; the Early, Periodic Screening, Diagnosis and Treatment ("EPSDT") provisions of the Medicaid Title of the federal Social Security Act; and Title VI of the 1964 Civil Rights Act.

3. This suit challenges Defendants' pattern and practice of failing to fulfill the federal constitutional and statutory obligations they owe to the children in Florida foster care as well as the children's need for a safe, stable and appropriate placement. This suit also challenges Defendants' deliberate indifference to the existence of such pattern and practice; to the children's need for safe, stable and appropriate placements; to the children's health and well being; and to the harm Defendants thereby cause these exceptionally vulnerable children. Plaintiffs, on behalf of themselves and all other similarly situated children, seek, injunctive and declaratory relief from such unconstitutional and otherwise illegal practices.

B. JURISDICTION

4. Because this is an action in which the matter in controversy arises under the Constitution and the laws of the United States, this Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1343(3).

C. PLAINTIFFS

1. Bonnie

5. Plaintiff Bonnie L. has been involved with Florida's foster care system since 1986, when she was two years of age. Her father's parental rights were terminated in 1987; her mother was having trouble making ends meet as a recently divorced single parent with few job skills. Instead of providing services to the child' s mother, DCAF convinced the mother to surrender the Plaintiff and her older sister J.L. so they could be adopted and have a 'better life." [Plaintiffs' sister J.L. has reached her

majority and has left Defendants' custody].

6. Bonnie's adoptive parents, who also cared for her sister and whom DCAF handpicked to care for these children, were abusive beyond imagination. The girls were subjected to innumerable beatings and other torture, including being tied to the bed by their wrists and ankles, being made to sleep on concrete surrounded by a brick cage at night, and punished if the two girls spoke to each other or anyone else. DCAF's "Hotline" received several calls reporting the abuses, including calls in 1990, 1993, 1994 and 1997, before Defendants finally took the girls back into foster care in March 1997 after a total of ten years of what DCAF itself called egregious abuse. Since then, DCAF chose not even to attempt to seek a permanent family for the girls, moving them from one unsuitable placement to another.

7. In 1999, a guardian ad litem located the girls' natural mother who asked to adopt her biological daughters, Bonnie and her sister. Although DCAF had no other options (and was not even looking for an adoptive placement for the girls), DCAF initially objected to either of the girls even having contact with their biological mother.

8. For more than three years, Defendants effectively had given up on achieving permanency for these girls and expected them to remain in foster care until they reached their majority. Recently, Defendants finally acquiesced to the biological mother's adoption of Bonnie, but the adoption is not final. Until it is final, this child remains in foster care.

9. Plaintiff Bonnie L. has suffered and continues to suffer irreparable harm as a result of Defendants' failure to protect her from harm and to provide her expeditiously with a permanent, legally stable family. Both the adoption and the child's placement with her biological mother could easily disrupt, which would require Defendants to select another placement for Bonnie. Defendants' continuing custody of and control over Bonnie, together with their pattern and practice of operating the Florida foster care system in an unconstitutional and otherwise illegal manner, create a real and substantial threat that this child

will be subjected to further harm in addition to that which Defendants have already inflicted on her. Plaintiff Bonnie L. brings this action through her next friend Donald Hadsock.

2. Rebecca and Reggie B.

10. Plaintiffs Reggie B. and Rebecca B. are 13-year-old twins who reside in District 9. They entered Defendants' custody and were placed in a shelter on May 4, 1997 and were adjudicated dependent on June 1, 1998. Suitable relative caretakers in other states were not contacted until very recently.

11. Reggie and Rebecca were separated for a while in foster care. For one month, Reggie was sent to a group home to develop "social skills." His therapist, teachers, former foster mother and DCAF caseworker all agree that something major happened at the group home that caused the child to deteriorate drastically. He was returned to his previous overcrowded foster home but continued to deteriorate emotionally, eventually killing a puppy. After he was asked to leave this foster home, he spent weeks moving from one shelter to another, from one foster home to another, usually a different place each night. He left one home and hitchhiked back to the DCAF offices after dark. He has developed such significant emotional problems while in care that he is now in a therapeutic group home.

12. Defendants have only recently approached an aunt of Reggie and Rebecca, who lives out of state, to be a placement resource for them. Although, on information and belief, she helped rear the children while their mother was alive and before they entered Defendants' custody, no prior request was made for her to care for these children. A home study of this aunt is now under way pursuant to the interstate compact for child placement, but only for Rebecca. If Defendants had previously identified this relative and placed Reggie and Rebecca with her, Reggie would have been spared the devastating harm he suffered in the group home. This, in turn, would have eliminated even the possibility that he would suffer the debilitating number of replacements he has endured or that he would be subjected to the night-to-night circuit. It would also have expedited the

placement of Rebecca - and made it possible for Reggie to be placed - with a permanent family.

13. Following his experience in Defendants' custody, Reggie now has such severe emotional problems that the aunt is unable to care for him. The twins are currently separated and are likely to remain so. This separation would not have been necessary had the children been provided adequate and safe care from the outset of their placement with Defendants.

14. Reggie also has a cleft palate and other medical needs which Defendants have failed to address. The Children's Medical Services reports several missed appointments, which have caused him to "fall through the cracks" at the clinic.

15. Reggie and Rebecca continue to be in Defendants' custody. Thus, Defendants continue to control where the twins are placed or if they are to be moved. The planned relative placement for Rebecca could easily disrupt prior to or possibly even after the child is moved, and Reggie's current placement in a therapeutic setting could end at any time. Either circumstance would require Defendants to place the children in a new foster home or facility.

16. Reggie and Rebecca have suffered and continue to suffer serious and irreparable harm as a result of Defendants' failure to protect them from harm, to ensure that Reggie has the medical care he needs, to provide a stable living environment that is adequate to both children's needs, and to achieve permanency expeditiously for these children, which could have been accomplished by Defendants' earlier identification of the aunt as a placement resource. As a result of Defendants' pattern and practice of operating the Florida foster care system in an unconstitutional and otherwise illegal manner, Reggie and Rebecca will continue to be at substantial and imminent risk of being subjected to the types of harm Defendants have already inflicted on them as long as they remain in Defendants' custody. They bring this action through their next friend Danielle Roussel.

3. Laurie and Lillie S.

17. Plaintiffs Laurie S. and Lillie S. are two Black foster

children who are sisters and are in the Defendants' custody in Palm Beach County. Born in 1991 and 1993 respectively, the girls entered Defendants' custody on December 19, 1994 and remain in foster care today.

18. Laurie and Lillie have several siblings in foster care with whom they were not placed, and they were not provided with sibling visitation. It was not necessary for Defendants to separate Laurie and Lillie from their siblings, or to deny them sibling visitation, in order to protect the health, safety or welfare of any of the children, and a professional competent to make such a judgment has never determined that placement together or regular and frequent visitation would be detrimental to any of them. Instead, these siblings were separated from each other because Defendants failed to recruit a sufficient number of foster homes for large siblings groups, and failed to arrange for visits between the separately placed children. This racially neutral method of administration has a disparate impact on Black siblings in foster care, making sibling separation more likely for Black foster children than for White foster children; has had the effect of discriminating against Laurie and Lillie and other Black foster children on the basis of their race or color; and has had the effect of defeating or substantially impairing the accomplishment of the objectives of Defendants' provision of foster care to Laurie, Lillie, and other Black children in Defendants' custody.

19. The parental rights of the children's mother were terminated in March of 1997. The father's rights were not terminated until May 1999.

20. DCAF did not perform a proper, diligent search to locate suitable caretakers for Laurie and Lillie. Instead, DCAF placed the girls in an inappropriate foster home that has been the subject of numerous investigations and is known for housing teenage girls who engage in casual and frequent sexual conduct. DCAF ignored complaints about the placement and kept Laurie and Lillie there for years.

21. The foster mother initially wished to adopt Laurie and Lillie, and, despite the problems with the foster home, the

children bonded to her and called her "grandma". However, Lillie began acting out sexually at school when she was six years old. When the DCAF adoption worker requested that the foster mother work on issues involving her home and parenting, the foster mother requested and obtained the immediate removal of the children.

22. The sudden move from the home where they had lived for the previous five years was traumatic for Laurie and Lillie. Their mental and emotional health began to deteriorate severely, and Lillie, at only seven years of age, expressed the wish to die. She was involuntarily committed to a mental health crisis unit.

23. DCAF has now located an uncle of Laurie and Lillie, who lives out of state and wishes to adopt the girls. This same uncle informed Defendants he was willing to adopt the girls when they were initially removed in 1994, but was told by DCAF that relatives could not adopt. Placement with this uncle in 1994 would have significantly increased Laurie's and Lillie's opportunity for permanency and concomitantly decreased the chance they would have been exposed either to a damaging environment such as that provided by their pre-adoptive home or the trauma of being uprooted.

24. Defendants' failure to achieve a permanent family for Laurie and Lillie more expeditiously resulted from Defendants' practice of treating Black and White foster children differently based on their race or color and is also due to Defendants' practice of making even less effort to provide services and develop and obtain appropriate foster and adoptive placements for Black foster children than for White children in Defendants' custody.

25. Defendants' failure to development and maintain a sufficient number of appropriate and safe foster homes and to timely identify relatives who are able and willing to care for children in foster care decreases the children's chance to have a permanent, loving home. These racially neutral practices have a disparate impact on Black foster children, have had the effect

of discriminating against Laurie, Lillie and other Black foster children on the basis of their race or color, and have had the effect of defeating or substantially impairing the accomplishment of the objectives of Defendants' provision of foster care for these children.

26. Laurie and Lillie have been and continue to be irreparably and seriously traumatized and harmed by Defendants' inappropriate handling of their case, their failure to protect these children from harm, and the several years' delay in being moved to a good permanent family. As a result of Defendants' pattern and practice of operating the Florida foster care system in an unconstitutional, racially discriminatory and otherwise illegal manner, Laurie and Lillie will continue to be at substantial and imminent risk of being subjected to the types of harm Defendants have already inflicted on them as long as they remain in Defendants' custody. Laurie S. and Lillie S. bring this action through their next friend Danielle Roussel.

4. Leslie F.

27. Plaintiff Leslie F. is in Defendants' custody as a foster child. She is currently 17 years of age. Leslie is Black and of Haitian descent. She was freed for adoption when she was nine years old, but has never been adopted or otherwise provided with a permanent home. Leslie's former foster mother adopted Leslie's biological brother, but. refused to adopt Leslie. She then cut off all contact between Leslie and her biological brother.

28. Leslie has endured over 30 different foster care placements, and possibly as many as 50 placements. The child was told by her DCAF foster care caseworker that DCAF could not find a stable placement for her because no one wants her.

29. The grossly inappropriate number of placements to which Defendants subjected Leslie and their failure to provide her with the services she needed to achieve permanency, including but not limited to placing her in an adoptive home that would accept her and providing supportive services to her and her adoptive family, resulted from Defendants' practice of treating Black and White foster children differently based on

or color. The remarkable instability of Leslie's placements and the failure to achieve permanency for her are also due to Defendants' practice of making even less effort to provide services and develop and obtain appropriate foster and adoptive placements for Black faster children than for White children in Defendants' custody. The system's discrimination against Black children is long-standing; the Defendants are aware of a 1978 Dade County grand jury report condemning the discrimination and demanding an end to it.

30. Defendants' failure to develop and maintain a sufficient number of appropriate foster and adoptive placements increases the likelihood children will be placed with foster parents incapable of caring for them, which, in turn, leads to disruption and multiple placements. The lack of placements also decreases the chance children will achieve permanency expeditiously. These racially neutral methods of administration have a disparate impact on Black children, have had the effect of discriminating against Leslie and other Black foster children on the basis of their race or color, and have had the effect of defeating or substantially impairing the accomplishment of the objectives of Defendants' provision of foster care to Leslie and other similarly situated children.

31. From late 1998 through early 1999, Leslie was in a shelter, even though there was nothing temporary about Defendants' custody of her and she was entitled to a stable placement where she would not suffer further damage or injury.

32. Eventually in 1999, DCAF finally found a foster home for Leslie, but when the DCAF foster care supervisor visited the home after Leslie complained about the conditions there, the supervisor reported the home for investigation because there was insufficient food for the children placed in the foster home, as well as other exhibited problems. These concerns were raised with a DCAF licensing supervisor who is responsible for determining whether foster homes will be licensed and retain their license to care for children in Defendants' custody. This DCAF supervisor was asked to talk to other children in the home

to verify the conditions there, but she refused to do so, stating she talks to the foster parents, not to the children. This DCAF supervisor also refused to call the child abuse "Hotline" to report the concerns about the children not being fed in the foster home which, if true, would constitute neglect. Her response was that she is an advocate for foster parents and does not call the Hotline to report them.

33. Since leaving the neglectful foster home in 1999, Leslie has endured several additional moves to other foster care placements. She and other foster children were removed from her most recent foster home in connection with allegations they were in grave danger in the home, and Leslie was placed in a shelter, a totally inappropriate placement for her. She was then placed in yet another temporary placement, from which she ran, but she intends to return to Defendants' physical custody, and remain in their legal custody.

34. As a result of her many moves, Leslie's education has been seriously disrupted. Although DCAF has not made reasonable efforts to find placements that would allow Leslie to continue to attend the same school, she herself has made Herculean efforts to maintain continuity in her education, often having to travel unacceptably long distances to remain in the same school after Defendants transferred to her a new foster care placement.

35. Leslie has sought an opportunity to participate in the subsidized Independent Living foster care program, a benefit provided by the State. There is no application process for this program, and Defendants do not provide children who are excluded from it with notice of the decision or an opportunity to have DCAF's decision reviewed, and their decisions concerning which children will participate in the program are arbitrary and capricious. Thus far, Leslie has not been included in the subsidized Independent Living program.

36. Leslie will turn 18 years of age in October 2000. She has mental health problems and will not be prepared to leave Defendants' custody when she reaches her majority. Individuals

in foster care are permitted to remain in care past their 18th birthday if they meet specified criteria, but Defendants do not provide youngsters in their custody who reach their 18th birthday with notice that they have this option or provide such individuals who are discharged from care with an opportunity to have the discharge decision reviewed before or after discharge. Defendants' decisions concerning which individuals will be permitted to remain in care after reaching 18 years of age are arbitrary and capricious. If Leslie is discharged from Defendants' custody when she reaches 18 years of age, she will be exposed to immediate and grave danger because she is not prepared to care for herself.

37. Until the Florida Dependency Court took the unusual step of appointing an attorney for Leslie, [something which does not occur for most children in dependency proceedings], Defendants had consistently deprived her of an opportunity to attend and participate in judicial and administrative reviews that addressed her legal, custodial and permanency status. Defendants have failed to notify Leslie of the judicial and administrative reviews, although they routinely provide notice to other parties concerning these types of proceedings, the court had not determined her attendance at judicial review hearings was not in her best interests, and Defendants had not determined she had insufficient maturity to attend administrative reviews of her case. Defendants have also failed to provide the services, such as transportation, that Leslie needed in order to be able to attend and participate in these proceedings, and she had no other source from which to obtain these services. Additionally, Defendants have arbitrarily and capriciously prevented Leslie from participating in DCAF's process for developing a case plan for her, although it would have been appropriate for her to participate in this process. Leslie's case plan addresses, among other things, the appropriateness of retaining her in Defendants' custody, her current placement, the services provided to her, her participation in an Independent Living Program, and other issues that are critical to her well being and development.

38. Leslie has suffered and continues to suffer irreparable and very serious injury as a result of Defendant's failure to protect her from harm, to provide her with a stable foster care placement, to provide her with permanency, to prevent her separation from her brother, to provide her with an opportunity to participate in all court hearings administrative reviews and the development of case plans that affect her, and to desist from their racially discriminatory practices. As a result of Defendants' pattern and practice of operating the Florida foster care system in an unconstitutional, racially discriminatory and otherwise illegal manner, Leslie will continue to be at substantial and imminent risk of being subjected to the types of harm Defendants have already inflicted on her as long as she remains in Defendants' custody. Leslie is also at imminent and very real risk of being denied participation in the subsidized Independent Living Program and discharged from Defendants' custody, without notice or an opportunity for a hearing to contest either decision. Leslie F. brings this action through her next friend Brenda Shapiro.

5. Sandra M.

39. District 9 Plaintiff Sandra M. is a 16-year-old who was sexually abused and neglected while living at home and, after six reports of suspected maltreatment, was removed from her mother and placed in foster care in 1989. Sandra and her brother were placed in one foster home for two years, where they bonded to their-good, loving foster parents. When the natural parents' rights were terminated and the children became available for adoption, Defendants, for no legitimate reason, denied the children's foster parents' request to adopt the children.

40. DCAF instead separated Sandra from her brother, and both children continued to be held in foster care limbo. Sandra was placed in several different foster homes over the next two years, while she was separated from her brother. She was eventually placed with a foster parent (foster parent "A") who offered Sandra stability.

41. Against the advice of Sandra's guardian ad litem,

Defendants then moved Sandra from A's foster home to an adoptive home with her brother and an older sister. By this time, Sandra and her siblings were displaying such disturbed behavior that this adoptive placement lasted only six months, and Sandra was moved back to foster parent A, being separated from her siblings for the last time. At this time Sandra was eight years old and foster parent A decided to adopt her. There were obvious problems with this mother' s parenting skills, which were well known to DCAF, and Sandra did not appear to be happy during her foster placement in the home, which boded ill for a successful adoption. DCAF pursued this adoption, which was finalized, but subsequently failed.

42. The adoptive mother could not handle Sandra, who continued to exhibit disturbed behavior. The adoptive mother placed her at the Nelle Smith Group Home, and on July 2, 1997, Defendants retook custody of Sandra. In the same month, the Nelle Smith Group Home closed, and Defendants placed Sandra at the White Foundation shelter, where she was attacked and beaten by two female residents on July 15, 1997. Due to Defendants' failure to care for her and to provide her with a safe placement, Sandra returned to her adoptive mother. But her adoptive mother was still unable to maintain Sandra due to the child's behavior, and she placed her back in foster care as of October 8, 1997.

43. After Sandra returned to foster care in Fall 1997, Defendants placed her in several foster homes until 1998, when she was placed at the South County Mental Health Center's Group Home, where she did well. But that facility, like the Nelle Smith Group Home, closed, and, because Defendants said they had nowhere else to place her, they placed Sandra at the crisis unit at South County Mental Health Center in April 1998. She remained there for one year, rather than the short (normally 72-hour) period for which placement there is designed. Finally, in May 1999, she was placed at the Adolescent Residential Learning Center at the 45th Street Mental Health Center, a residential psychiatric setting. She was then "stepped down" to

Daniel Memorial Therapeutic group home in December 1999, where she remains.

44. Defendants have never moved to terminate the parental rights of Sandra's adoptive parent; Sandra remains in Defendants' custody as a foster child; and Defendants' intention is for her to remain in foster care until she reaches her majority. Effectively, Defendants have abandoned any attempt to find a permanent home for Sandra.

45. Sandra has been and continues to be seriously and irreparably harmed by Defendants' failure to provide her with a safe and stable foster care placement or an appropriate and stable permanent family. As a result of Defendants' pattern and practice of operating the Florida foster care system in an unconstitutional and otherwise illegal manner, Sandra will continue to be at substantial and imminent risk of being subjected to the types of harm Defendants have already inflicted on her as long as she remains in Defendants' custody. She brings this action through her guardian ad litem Danielle Roussel.

6. Tanya

46. Plaintiff Tanya M. is a 14-year-old foster child who was first placed in foster care on August 31, 1998. District 9 DCAF has placed her in several different unsuitable placements including foster homes where she has been neglected and subjected to cruel and dangerous treatment. In one home, she was not adequately fed and lost a significant amount of weight within one month. Tanya was thin to start with, and this weight loss was unnecessary and harmful. Her complaints to her DCAF worker about this foster home were ignored. In her next foster home, she was one of eight children. All eight children slept in one bedroom and shared one dresser.

47. Tanya's need to be placed in an appropriate foster home was ignored, and DCAF left her at another overcrowded home where she had previously been placed, even though the foster mother had already warned DCAF the child was not acceptable for placement there. Despite this warning, the DCAF worker left Tanya at this foster home after the DCAF office had

closed. The foster mother made it clear she did not want Tanya there, and as a result, Tanya left the foster home, although she had no place to go. Later that night, a Pahokee Police Department officer who was concerned that it was unsafe for her to be walking alone in the area after dark picked up Tanya. At the time, she was carrying all of her possessions in bags and a backpack.

48. Subsequently, an appropriate home was located and Tanya began to thrive in her new environment; she began to do well in school, also. She was subsequently returned to her biological parents on October 18, 1999, after more than 12 months in the foster care system.

49. The reunification with her parents failed. After less than two months, on December 5, 1999, Tanya was assaulted by her father and sustained a broken arm. Tanya was placed in a DCAF shelter and then returned to foster care on May 1, 2000.

50. Both times Tanya was removed from her biological family's home (in 1998 and 2000), her three younger siblings were removed simultaneously. Tanya, however, has never been placed with her siblings, although placement together would not be contrary to the health, safety or welfare of any of the children. No professional qualified by the training, credentials and experience needed to make a sibling-separation decision has ever found that a joint placement would be detrimental to any of the children.

51. Tanya was placed in an overcrowded girls' group shelter. DCAF has stated that it wants to place Tanya at a wilderness camp, which is primarily used as a moderate risk delinquency commitment program, even though Tanya is not a delinquent and has not committed any violations of the law. Tanya remains in Defendants' legal custody as a foster child. As a result of Defendants' failure to provide minimally adequate care and supervision of Tanya, she has run away from the shelter, and her whereabouts are not known, subjecting her to grave danger.

52. Tanya has suffered and continues to suffer irreparable and very serious injury as a result of Defendants'

failure to protect her from harm and provide her with a secure, safe and appropriate placement. As a result of Defendants' pattern and practice of operating the Florida foster care system in an unconstitutional and otherwise illegal manner, Tanya will continue to be at substantial and imminent risk of being subjected to the types of harm Defendants have already inflicted on her as long as she remains in Defendants' custody. She brings this action through Danielle Roussel.

7. Jay and Candice D.

53. Plaintiffs Jay D. and Candice D. are brother and sister, born on August 28, 1992 and May 6, 1991, respectively. They were placed in foster care on February 15, 1996, and have lived continuously in foster care since that date. They remain in Defendants' custody. Parental rights were terminated with respect to these children on June 17, 1998.

54. Jay and Candice have resided in a stable home-like environment at the Real Life Children's Ranch since April 30, 1997. Candice has lived with the same group-home parents for her entire placement at the Real Life Ranch, and Jay has lived with his same group-home parents since September 1998. The children are bonded to their house parents, attend community schools, and are part of their group-home families; both families want to adopt the D. children who currently resides with them and have placed adoption bids for the children.

55. For some time Jay's and Candice's older brother was also placed at the Real Life Ranch. The younger children had been separated from him earlier because of his aggressive behavior, and he was subsequently discharged from the Real Life Ranch on July 22, 1999, because of allegations of inappropriate sexual behavior toward his siblings. The elder brother was subsequently rejected by a prospective foster home based on the perceived danger he posed to the family's biological son, and he was eventually placed in a facility with his own alarmed room. This placement also failed because of his aggression toward the younger children also in the facility.

56. Jay and Candice, who had exhibited problematic

behaviors while their elder sibling was at the Real Life Ranch, have achieved far more stable and acceptable behavior patterns since his removal and they are doing remarkably well in their placement. The children's therapist, as well as the staff at the Real Life Ranch, have indicated their belief that Jay's and Candice's behavior has stabilized because their elder brother was removed from their living environment, which resulted in the children developing an increased sense of security.

57. Between April 1997 and February 2000, Jay and Candice had only three visits from a DCAF caseworker. The decision to deny them caseworker oversight and protection was not subject to a meaningful professional, administrative or judicial review.

58. Despite Defendants' almost complete lack of meaningful contact with Jay and Candice for almost three years, on March 20, 2000, Defendants announced their intention to remove Jay and Candice from the Real Life Ranch almost immediately, place them in an interim foster placement and then replace them in yet another foster home to which their elder brother would also be moved. This plan is currently on hold, but since Defendants announced their intention to remove Jay and Candice from the Real Life Ranch, they have excluded the personnel of the Real Life Ranch from any case planning, staffings or meetings concerning Jay and Candice. Defendants cannot make competent professional judgments about how these children are functioning, what their needs are, and what plans are appropriate for them in the absence of-information from the responsible adults who care for and observe Jay and Candice on a daily basis.

59. As long as Jay and Candice remain in foster care, they are at substantial and very real risk that Defendants will return to their long-standing policy and practice of denying these children the protection of monthly caseworker visits, to which they are entitled.

60. Jay and Candice are at imminent risk of further serious and irreparable injury because Defendants fail to exercise

competent professional judgment in making decisions concerning these children's care and safety and intentionally exclude critically important and readily available information from that decision-making process. Plaintiffs Jay D. and Candice D. appear by their next friend Lori A. Haythorn.

8. Matthew I.

61. Plaintiff foster child Matthew I. is two years old. He entered foster care in October 1999. Matthew was neglected in a grossly overcrowded foster home in Palm Beach County that housed a total of seven children, including a child with Down's Syndrome, whose special needs placed a further drain on the foster parents. Defendants were fully aware of the number of children in this home when they placed and retained Matthew and the other foster children there.

62. On October 15, 1999, a worker from an agency that contracts with Defendants observed Matthew to be very sick, to have difficulty breathing, and to have a bite mark on his arm. The foster mother reported that another two-year-old in the foster home had bitten Matthew.

63. On November 6, 1999, a worker from the same contract-agency observed Matthew to be very dirty, with dirty ears, dirty hair, scaly skin on his scalp, a bruise on his chin, a dirty diaper with red sores and scabs on his buttocks and inner thighs, and long, dirty finger and toe nails. Matthew was again very sick and wheezing. The foster home was observed as emitting a strong, offensive odor; the sink was overflowing with dirty dishes; old food was on the floor; and weeks' worth of dirt was encrusted on the floor. The contract-agency worker took Matthew to a hospital emergency room. He had a fever of 104 degrees and was diagnosed with bacterial pneumonia; he was treated and released. The foster home was reported to Defendants' child abuse "Hotline".

64. On November 19, 1999, a DCAF worker observed Matthew to be very sick, dirty and with a black eye. The foster mother reported that Matthew and another child fell off the couch while fighting. The DCAF worker did not report the

condition of the foster home or of Matthew to the "Hotline". Despite repeated observations that this was an unfit foster home, Defendants did not remove Matthew from this home until January 17, 2000. Matthew's new foster mother observed him to be very sick and to have difficulty breathing when she received him. A nebulizer machine was provided to the new foster home for Matthew's use, but the new foster mother did not know, and was not instructed, how to use it. After five days in this new foster home, Matthew was observed as looking better than he ever had. Instead of being left there, he was returned to the previous foster home on January 24, 2000. On at least three subsequent occasions, Matthew was observed as extremely dirty, and he was consistently sick at his day care center. Matthew was finally removed from this inadequate and, for him, dangerous home on February 9, 2000.

65. Matthew has suffered and continues to suffer serious and irreparable harm as a result of Defendants' failure to ensure he has the medical care and living environment that meet his needs and do not subject him to harm. As a result of Defendants' pattern and practice of operating the Florida foster care system in an unconstitutional and otherwise illegal manner, Matthew will continue to be at substantial and imminent risk of being subjected to the types of harm Defendants have already inflicted on him as long as he remains in Defendants' custody. Matthew I. brings this action through Danielle Roussel.

9. Hugh S.

66. Plaintiff Hugh S. is a 16-year-old Palm Beach County foster child. In 1996, when he was twelve years old, his mother died and his father turned him in to DCAF, claiming he was not the child's biological father. The parental rights of the father were never terminated, and DCAF has neither located Hugh's natural father nor made an attempt to locate a good, permanent substitute family for this child.

67. Hugh has been moved from place to place because of a lack of placements for teenagers, and he has missed a significant amount of school, having spent many days in DCAF's

office rather than in school. He has spent weeks not knowing where he would be spending the night from one night to the next. He would wait in the DCAF office during the day and then be taken to a place in the evening where he could only spend one night. Night-to-night placements are not uncommon for children in Defendants' custody; the DCAF pattern and practice of not timely moving children to permanency contribute to overcrowding in foster placements and a lack of sufficient, safe, suitable foster placements.

68. Hugh has had inadequate clothing, and often had no jacket; his foster home did not have the funds to purchase a jacket for him. This situation prompted complaints to DCAF from his school that he would come to school with inadequate and dirty clothes.

69. During the summer of 2000, Hugh resided with his father (who originally placed him into foster care), but remained in Defendants' custody as a foster child. His father then returned Hugh to Defendants' physical custody, and he was again on the night-to-night circuit. During July 2000, he resided at a runaway shelter, although he is not a runaway, and had only one change of clothing. The shelter insisted Hugh attend summer school because all of the youngsters at the shelter did so, although he had inadequate clothing and had not previously been in summer school. Even if Hugh eventually returns to his father, this arrangement could easily disrupt, as it has in the past, and Hugh could remain in or return to foster care.

70. Hugh has been and continues to be seriously and irreparably harmed by Defendants' failure to provide him with a stable, appropriate placement, to achieve permanency for him, and to provide for his basic needs. As a result of Defendants' pattern and practice of operating the Florida foster care system in an unconstitutional and otherwise illegal manner, Hugh will continue to be at substantial and imminent risk of being subjected to the types of harm Defendants have already inflicted on him as long as he remains in Defendants' custody. He brings this action through his next friend Danielle Roussel.

10. Leanne and Tammy G.

71. Plaintiff foster child Leanne G. is a two-and-one-half-year-old Black girl who was taken into Defendants' custody and placed in a shelter at birth and entered formal foster care (after dependency adjudication) as a young infant on March 11, 1999. Leanne was then placed in a neglectful and inadequate foster home, where she failed to thrive. By age 13 months, Leanne was still not on solid food and was kept in her crib or playpen the majority of the time.

72. Leanne's foster mother refused to take the child to the pediatrician between March 17, 1999 and September 10, 1999. When the DCAF worker finally took Leanne to the pediatrician, the pediatrician could not effectively treat the child because the DCAF worker provided no information about the child and the foster mother refused to attend appointments. The pediatrician, who threatened not to treat Leanne any further unless he was provided with necessary information, also noted that the "baby's muscles [were] very tight... but does [sic] not bear weight" and that the "baby [was] not receiving therapies."

73. Leanne has five siblings in foster care, including Plaintiff Tammy G. Leanne did not see her siblings for one year. There is no legitimate reason for Leanne's and Tammy's separation from their siblings or the denial of sibling visitation. The decision to separate these children and deny them visitation with each other was not reviewed by a professional qualified by training, experience and credentials to determine whether separating the children was necessary to protect their health, safety and welfare.

74. Defendants have separated these children only because they do not have a sufficient number of foster homes that will care for large family groups. The effects of separating siblings in their placements are compounded by the Defendants' unjustified failure to arrange for visitations between siblings at least once monthly, as required by law. Defendants' racially neutral failure to recruit a sufficient number of foster families suitable for sibling groups and their failure to provide at least

monthly visitations between siblings has a disparate impact on Black siblings in foster care, making sibling separation more likely for Black foster children than for White foster children; has had the effect of discriminating against Tammy, Leanne and other Black foster children on the basis of their race or color, and has had the effect of defeating or substantially impairing the accomplishment of the objectives of defendants' provision of foster care to Tammy, Leanne and other Black children in Defendants' custody.

75. Although Leanne has been placed in a pre-adoptive home, DCAF has effectively put the adoption on hold and the prospective adoption and the placement could easily disrupt at any time. Defendants do not have an alternative strategy for achieving permanency for Leanne.

76. Defendants' failure to achieve permanency for Leanne has resulted from Defendants' practice of making even less effort to provide services and develop and obtain appropriate adoptive placements for Black foster children than for White children in Defendants' custody.

77. Defendants' failure to develop and maintain a sufficient number of adoptive homes decrease the likelihood children will achieve permanency expeditiously. This racially neutral method of administration has a disparate impact on Black children, has had the effect of discriminating against Leanne and other Black foster children who are appropriate for adoption on the basis of their race or color, and has had the effect of defeating or substantially impairing the accomplishment for Leanne and similarly situated Black foster children of the objectives of Defendants' foster care and adoption program.

78. Leanne has been and continues to be irreparably and seriously injured by Defendants' failure to protect her from harm, to meet her basic needs, to achieve permanency for her, and to place her with her siblings or, if that would be harmful to one of the children, as determined by professional competent to make such a determination, to provide her with regular and frequent sibling visitation. (Such a professional might, but would not

necessarily, find that a delay in achieving permanency for one of the children would pose an unacceptable risk of harm to the child, justifying separation). As a result of Defendants' pattern and practice of operating the Florida foster care system in an unconstitutional, racially discriminatory and otherwise illegal manner, Leanne will continue to be at substantial and imminent risk of being subjected to the types of harm Defendants have already inflicted on her as long as she remains in Defendants' custody. She brings this action through her next friend Danielle Roussel.

79. Plaintiff Tammy G. is a nine-year-old Black foster child from District 9 who was placed in foster care on October 21, 1997, at the same time as four of her siblings. She has seen her siblings only once during the past year. Her younger sister, Plaintiff Leanne, came into care in 1999, and the six siblings are in six different homes.

80. Tammy has been in four separate homes in the past three years. In one home, the foster parent punished Tammy by forcing her to stand with one leg in the air, for considerable periods of time. In another placement, the foster mother abusively punished her by twisting her arm behind her back and by twisting her nose. The abuse was not adequately investigated by DCAF, consistent with its pattern and practice of greater toleration of child abuse committed by DCAF agents and contract providers than that allegedly committed by parents.

81. In her current DCAF-selected placement, Tammy sleeps with three other children in a room attached to a converted garage. This room has central air conditioning, but the air conditioning is not used. Tammy is not being fed properly in this foster home.

82. Defendants' failure to provide Tammy with the services she needed to achieve permanency, including but not limited to taking the reasonable, necessary steps to seek and secure an appropriate adoptive home for her, resulted from Defendants' practice of treating Black and White foster children differently based on their race or color. Defendants' failure to

achieve permanency for Tammy is also due to Defendants' practice of making even less effort to provide services and develop and obtain appropriate adoptive placements for Black foster children than for White children in Defendants' custody.

83. Defendants' failure to develop and maintain a sufficient number of adoptive homes decrease the likelihood children will achieve permanency expeditiously. This racially neutral practice has a disparate impact on Black children, has had the effect of discriminating against Tammy and other Black foster children appropriate for adoption on the basis of their race or color; and has had the effect of defeating or substantially impairing the accomplishment of the objectives of Defendants' foster care and adoption program for Tammy and other similarly situated Black foster children.

84. Tammy has been and continues to be irreparably and very seriously injured as a result of Defendants' failure to protect her from harm and to provide her with both a stable placement and permanency, as well as by Defendants' separation of Tammy from her siblings and denial of regular and frequent visitation. As a result of Defendants' pattern and practice of operating the Florida foster care system in an unconstitutional, racially discriminatory and otherwise illegal manner, Tammy will continue to be at substantial and imminent risk of being subjected to the types of harm Defendants have already inflicted on her as long as she remains in Defendants' custody. She brings this action through her next friend Danielle Roussel.

11. Elaine R.

85. Plaintiff Elaine R. is an eleven-year-old Dade County child who was taken into Defendants' custody in 1993 and has languished in foster care since then. Separated for no reason from her siblings, who are also in foster care, she finally had parental rights terminated in or before August 1997 and was then placed for adoption with a licensed foster family. At the time of this placement, the father of this foster family already had a criminal record for sexually abusing children. Elaine lived nearly twelve months in that pre-adoptive home, subjected to

multiple sexual assaults and abuse before she was removed from this foster home and criminal charges were instituted against the foster father.

86. A suitable adoptive parent has now been found for Elaine, but Defendants are delaying this adoption, thereby denying Elaine the opportunity to have a real, permanent family. Defendants have no alternative strategy by which Elaine will achieve permanency.

87. Elaine has suffered and continues to suffer serious and irreparable injury as a result of Defendants' failure to protect her from harm, to protect her interest in living and maintaining contact with her siblings, and to provide her with a permanent, legally stable family. As a result of Defendants' pattern and practice of operating the Florida foster care system in an unconstitutional and otherwise illegal manner, Elaine will continue to be at substantial and imminent risk of being subjected to the types of harm Defendants have already inflicted on her as long as she remains in Defendants' custody. She brings this action through her guardian ad litem Kristi Kassebaum.

12. Paul B.

88. Plaintiff Paul B. is a 16-year-old Black foster child from Palm Beach County. While living with his biological family, he was placed under DCAF supervision in April 1983 at the age of two weeks and remained under DCAF supervision until he entered foster care in September of 1993, at the age of ten years. Paul has had at least 33 placements, including a period at a DCAF shelter (although he had already been adjudicated dependent), where he was placed due to a claimed lack of foster homes. This shelter facility was used to house juvenile delinquents, some of whom were violent offenders.

89. Paul's multiple moves, as well as his having to attend school at such shelter facilities, have caused him to fall behind in his education. The Palm Beach County Board of Education has no record that Paul attended school during an entire academic year Paul spent in a DCAF facility.

90. Paul has, moreover, been denied a good permanent

family. Paul's parents' rights were terminated, but he was never placed for adoption.

91. The outrageous number of times Defendants moved Paul and their failure to provide him with the services he needed to achieve permanency, including but not limited to the placement of Paul in an adoptive home, resulted from Defendants' practice of treating Black and White foster children differently based on their race or color. The shocking instability of Paul's placements and the failure to achieve permanency for him are also due to Defendants' practice of making even less effort to provide services to and develop and obtain appropriate foster and permanent placements for Black foster children than for White children in Defendants' custody.

92. Defendants' failure to develop and maintain a sufficient number of appropriate foster and adoptive placements increases the likelihood children will be placed with foster parents incapable of caring for them, which, in turn, leads to disrupted and multiple placements. The lack of placements also decreases the chance children will achieve permanency expeditiously. This racially neutral method of administration (the failure to maintain a sufficient number of foster placements) has had a disparate impact on Black foster children, has had the effect of discriminating against Paul and other Black foster children on the basis of their race or color, and has had the effect of defeating or substantially impairing the accomplishment of the objectives of Defendants' placement of Paul and other similarly situated Black children, out of their own home and into foster care.

93. Paul has and continues to suffer serious and irreparable harm as a result of Defendants' failure to provide him with a safe, stable and secure placement, to ensure he received an adequate education, and to provide him with a permanent, legally stable family. Paul's injuries also resulted from Defendants' racial discrimination. Paul is currently in Defendants' legal custody. As a result of Defendants' pattern and practice of operating the Florida foster care system in an unconstitutional,

racially discriminatory and otherwise illegal manner, Paul will continue to be at substantial and imminent risk of being subjected to the types of harm Defendants have already inflicted on him as long as he remains in Defendants' custody. He brings this action through his next friend Danielle Roussel.

13. Rachel C.

94. Plaintiff Rachel C. is a 13-year-old Palm Beach County child kept by DCAF in a temporary shelter for more than 12 months, from approximately October 5, 1998 through approximately April 3, 2000. At this shelter, Rachel was housed with girls with significant mental health and delinquency histories, rendering this facility entirely inappropriate for her. While Rachel resided there, she was charged as a delinquent. Rachel left Defendants' care in April 2000 to reside with an uncle, but returned to Defendants' custody on June 13, 2000. Rachel remains in Defendants' custody as a foster child, and is in a shelter.

95. Rachel has suffered and continues to suffer irreparable and very serious harm as a result of Defendants' failure to provide her with a safe, stable and secure placement. As a result of Defendants' pattern and practice of operating the Florida foster care system in an unconstitutional and otherwise illegal manner, Rachel will continue to be at substantial and imminent risk of being subjected to the types of harm Defendants have already inflicted on her as long as she remains in Defendants' custody. Rachel C. brings this action through her next friend Danielle Roussel.

14. Cathy W.

96. Plaintiff Cathy W. is a twelve-year-old child who was held in a temporary shelter in District 9 beginning in May 1999, even though the Defendants knew the placement exposed her to significant danger and provided her with inadequate supervision. Cathy was involved in several sexual incidents at the shelter, which were clearly and obviously foreseeable, given the past behavior of the youngsters involved, the inappropriateness and danger created by having these children in

the same facility, and the absence of minimally competent supervision of these children. Cathy remains in Defendants' custody as a foster child.

97. While in this chaotic and inadequately supervised environment Cathy was charged as a delinquent. She remains in Defendants' custody as a foster child and has since been placed in a residential treatment facility. As a result of these incidents and Defendants' failure to provide Cathy with a safe, stable placement, Cathy has been seriously and irreparably harmed and her health has been placed at grave risk. As a result of Defendants' pattern and practice of operating the Florida foster care system in an unconstitutional and otherwise illegal manner, Cathy will continue to be at substantial and imminent risk of being subjected to the types of harm Defendants have already inflicted on her as long as she remains in Defendants' custody. Cathy W. brings this action through Danielle Roussel.

15. Larissa C.

98. Plaintiff Larissa C. was two years old in July 2000. While in foster care, she was placed in an abusive and neglectful foster placement in Flagler County where she was subjected to repeated abuse. Defendants failed both to screen this foster home adequately before placing Larissa there and to supervise the foster home while she lived there. The traumatic brain injuries inflicted upon this child by the foster parents DCAF selected and then failed to supervise have left her partially paralyzed with impaired vision and speech. Larissa remains in Defendants' custody as a foster child.

99. Larissa has been and continues to be irreparably and very seriously injured as a result of Defendants' failure to protect her from harm. As a result of Defendants' pattern and practice of operating the Florida foster care system in an unconstitutional and otherwise illegal manner, Larissa will continue to be at substantial and imminent risk of being subjected to the types of harm Defendants have already inflicted on her as long as she remains in Defendants' custody. She brings this action through her attorney ad litem and next friend Rhoda Goodson.

16. John J.

100. Plaintiff John J. (twelve years of age) entered Defendants' custody as a foster child in approximately 1989 and is still in foster care. John has been in multiple different foster placements. Until recently, Defendants failed to search for a suitable relative placement, although it was discovered years after he entered Defendants' custody that an appropriate aunt was willing to care for John.

101. During his stay in foster custody, DCAF District 6/Hillsborough County DCAF kept John for more than 12 months at an over-crowded foster home where he was subjected to beatings and horrible, sadistic abuse, including hot sauce applied to his tongue, his face dunked in the toilet bowl and kept there until he gasped for breath, and ridicule, all prohibited by the Defendants' rules. Although DCAF's rules prohibit more than five children in a house, this house was licensed for seven children during the pertinent time. Following DCAF's express rejection, in 1993, of a request to increase the licensed number to ten children, there were in fact ten or more children there during the material times. When the child abuse "Hotline" was called, DCAF ignored the abuses, exonerated the foster parents and kept the home open.

102. John has suffered and continues to suffer serious and irreparable injury as a result of Defendants' failure to protect him from harm and Defendants' delay in providing him with an opportunity for a permanent, legally stable family. As a result of Defendants' pattern and practice of operating the Florida foster care system in an unconstitutional and otherwise illegal manner, John will continue to be at substantial and imminent risk of being subjected to the types of harm Defendants have already inflicted on him as long as he remains in Defendants' custody. John J. brings this action through his next friend Mary Miller.

18. Melinda and Karina

103. Plaintiff Karina (17 years of age) is one of two Dade County DCAF/District 11 sisters held by the State of Florida in foster care since 1986; they were four and two years of

age when they entered Defendants' custody. Now 18, Melinda should still be in foster care, participating in the subsidized independent living program. DCAF conferred with her without her guardian ad litem or her attorneys present and coerced and misled her to allegedly sign a form purportedly ending foster care efforts for her. Defendants have not provided Melinda's guardian ad litem or court-appointed counsel with a copy of the alleged form; Plaintiffs believe any such form to be invalid, under the circumstances existing, and efforts for Melinda to re-access services to which she may be entitled are ongoing. Plaintiff Karina remains in foster care. Neither was ever placed for adoption, and Defendants never pursued an alternative form of permanency for either child. In fact, despite adoption being recommended several times by some DCAF caseworkers and DCAF retained therapists, these girls were never even available for adoption because Defendants, contrary to law, made absolutely no efforts to terminate the parental rights of their absent father and give them an opportunity for permanency, even though DCAF knew the lack of a permanent family was seriously harming the girls.

104. During their 14 years in Florida's foster care system, Melinda and Karina have been subjected to rapes, beatings and neglect. Melinda contracted syphilis when she was nine years old. The girls have been wrongly separated from each other. Their minds have been damaged by years of psychotropic medications administered for non-therapeutic reasons with Defendants' approval for the convenience of their caretakers. They have been confined for years needlessly in restricted, locked facilities and held there as virtual captives. Melinda and Karina now have permanent mental disabilities.

105. Although of mixed Hispanic descent, Melinda and Karina were labeled and treated as African-American children. The number of placements to which Defendants subjected Melinda and Karina and Defendants' failure to provide them with the services they needed to achieve permanency, including but not limited to the prosecution of a proceeding to terminate

parental rights of their father and placement of these girls in an adoptive home, resulted from Defendants' practice of treating Black and White foster children differently based on their race or color. Melinda's and Karina's lack of a stable placement and a permanent family are also due to Defendants' practice of making even less effort to provide services and develop and obtain appropriate foster and adoptive placements for Black foster children than for White children in Defendants' custody.

106. Defendants' failure to develop and maintain a sufficient number of appropriate foster and adoptive placements increases the likelihood children will be placed with foster parents incapable of caring for them which in turn leads to disrupted and multiple placements. The lack of placements also decreases the chance children will achieve permanency expeditiously. These racially neutral practices have a disparate impact on children of color and have had the effect of discriminating against Melinda and Karina and other similarly situated foster children on the basis of their color or their race or perceived race, and have had the effect of defeating or substantially impairing the accomplishment of the objectives of Defendants' provision of foster care for Melinda and Karina and other children of color.

107. Karina, the younger sister, remains in Defendants' custody as a foster child and does not have a permanent family, and is currently absent from her placement without permission. Defendants have done little or nothing to recover Karina, although, while absent from her placement, she has been seriously injured and continues to be at grave and imminent risk of further harm.

108. Melinda is now 18 years of age, and she is either still in Defendants' legal custody or was misled or coerced by Defendants into leaving their custody. Melinda meets the eligibility criteria for remaining in foster care beyond her 18th birthday, but Defendants have effectively denied her this option without the opportunity for a hearing to determine her eligibility and entitlement to remain in foster care.

109. Until the Florida Dependency Court took the unusual step of appointing an attorney for Melinda, [something which does not occur for most children in dependency proceedings], Defendants had consistently deprived her of an opportunity to attend and participate in judicial and administrative reviews that addressed her legal, custodial and permanency status. Defendants have failed to notify Melinda of the judicial and administrative reviews, although they routinely provide notice to the other parties concerning these types of proceedings, the court had not determined her attendance at judicial review hearings was not in her best interests, and Defendants had not determined she had insufficient maturity to attend administrative reviews of her case. Defendants have also failed to provide the services, such as transportation, that Melinda needed in order to be able to attend and participate in these proceedings, and she had no other source from which to obtain these services. Additionally, Defendants arbitrarily and capriciously prevented Melinda from participating in DCAF's process for developing a case plan for her, although it would have been appropriate for her to participate in this process. Melinda's case plan addresses, among other things, the appropriateness of retaining her in Defendants' custody, her current placement, the services provided to her, her participation in an Independent Living Program, and other issues that are critical to her well being and development.

110. Melinda' and Karina have suffered and continue to suffer irreparable and very serious injury as a result of Defendants' failure to protect them from harm, to provide them with the opportunity to have a permanent, legally stable family, and to provide them with appropriate care. Melinda has further been seriously and irreparably harmed by being deprived of continuing foster care services through Defendants' arbitrary and capricious actions and by being denied an opportunity to participate in all court hearings, administrative reviews and the development of case plans that affect her. As a result of Defendants' pattern and practice of operating the Florida foster

care system in an unconstitutional, racially discriminatory and otherwise illegal manner, Melinda and Karina will continue to be at substantial and imminent risk of being subjected to the types of harm Defendants have already inflicted on them as long as they remain in Defendants' custody. The girls are acting through their guardian ad litem Brenda B. Shapiro.

D. DEFENDANTS

111. Defendant Jeb Bush is the Governor of the State of Florida, the head of the Executive Branch of government and the person responsible for the proper operation of the foster care and adoption systems and for the hiring and continued employment of Kathleen Kearney, Secretary of DCAF. Defendant Bush is sued in his official capacity. By law, Defendant Bush is responsible for supervising Defendant Kearney. He is also responsible for the proper administration of DCAF, proposing a proper budget for DCAF to the legislature and assuring that DCAF operates in conformity with the federal law and State plans submitted to the federal government, which allow Florida to qualify for funding under Title IV and Title XIX of the Social Security Act, including the Adoption and Safe Families Act and the EPSDT provisions of the Medicaid Title of the federal Social Security Act.

112. Defendant Bush is responsible for ensuring that DCAF is operated in accordance with federal law and protects the federally ensured civil rights of the children in Florida foster care, to ensure that the system is not operated recklessly or with deliberate indifference to the needs, safety, lives and rights of Florida's foster children. Additionally, since his inauguration in January 1999, Defendant Bush has directed the operation of Florida's foster care system and dictated the actions to be taken by the other Defendants in the operation of Florida's foster care system in a manner that is contrary to law and proper, competent professional standards.

113. Defendant Kathleen Kearney is Secretary of the Department of Children and Families of the State of Florida. She is sued in her official capacity. Under Florida law, Defendant

Kearney is responsible for supervising, directing, organizing, planning, administering and executing the functions of DCAF, for ensuring that DCAF performance is in compliance with federal law, for operating the foster care system in such a way as to protect the lives, safety, health and rights of the children in Florida foster care and for ensuring it is operated in such a manner that competent professional judgment is exercised in caring for the children. Additionally, she is responsible for ensuring that DCAF agents and employees exercise proper professional judgment consistent with professional standards in caring for the children subject to their jurisdiction and in their care. Defendant Kearney is also responsible to ensure that the system is not operated recklessly or with deliberate indifference to the needs, safety, lives and rights of Florida's foster children. In this role, she serves at the pleasure of and subject to the direction of Defendant Bush.

114. Defendants Bates, Awad, Tibbs, Johnson, Richard, Dixon, Morin, Gibbons, Brown, Auslander, Davenport, Howard, Gray and Martin are the District Administrators of DCAF' s Districts one through Nine and Eleven through Fifteen, respectively [collectively referred to as "District Administrators"]. They are sued in their official capacity. Each District Administrator serves at the pleasure and direction of Defendants Kearney and Bush; each serves as the local official in charge in their respective DCAF districts, to ensure that the children in Defendants' custody are free from harm and receive proper care while in state foster care. They also have the legal duty to ensure that the foster care system is operated in accordance with federal law and protects the civil rights of the children in Florida foster care. Each District Administrator is further obligated to ensure that proper professional standards and judgment are exercised in determining and providing for the protection, familial and permanency needs of the children in foster care, and to ensure that the system is not operated recklessly or with deliberate indifference to the needs, safety, lives and rights of Florida's foster children.

115. Defendants are aware of the rampant deficiencies in the operation of the Florida foster care/adoption system and have failed to take the steps needed to cause it to operate in a manner that does not violate the federally protected rights of the children in Defendants' care, but instead is operated in conformity with accepted professional standards.

116. At all times and in all respects relevant to the claims herein, Defendants Bush, Kearney and the District Administrators were acting in their official capacities and under color of state law.

E. CLASS ACTION ALLEGATIONS

1. The System-Wide Class

117. Plaintiffs bring this action on behalf of themselves and all others similarly situated pursuant to Rule 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure. The class consists of all children who are currently or who will be in the custody of Defendants as an alleged or adjudicated dependent child.

118. Every child in foster care is directly and adversely affected by the Defendants' deficient operation of Florida's foster care system and specifically by Defendants' acts and decisions that impair the children's federally protected rights as a result of Defendants' failure to comply with accepted professional standards and to exercise competent professional judgment. Children who have the misfortune of being taken into Florida's foster care system routinely have
their rights deliberately disregarded by Defendants and are likely to be harmed by the experience.

119. Plaintiffs are members of the class they seek to represent; each Plaintiff and each putative class member is currently in Defendants' custody, with the possible exception of Melinda who, if she is not in Defendants' custody, was improperly coerced or misled by Defendants into leaving foster care.

120. The class is so numerous that joinder of all class members is impracticable. There are presently approximately

15,000 children in Florida foster care, including foster home care, emergency shelter care and residential group care, and Defendants expect this population to increase to over 18,000 by June 2001. "Expenditures by issue and Appropriation Category, Detail of Expenditures, Exhibit D-3A" September 10, 1999, at 145-46; hereinafter "Budget Document.")

121. There are questions of law or fact that are common to Plaintiffs and the members of the class they seek to represent, and the claims of the Plaintiffs are typical of the claims of the other class members. Each Plaintiff and each putative class member is in need of safe and adequate foster care, must rely on Defendants for the provision of all care, treatment and services they need, and is harmed by the Defendants' systemic failures to fulfill their legal obligations in the provision of such care, treatment and services.

122. The common questions of fact shared by Plaintiffs and the members of the class they seek to represent include:

a. Whether Defendants fail to provide children in their custody with safe, stable and secure foster care placements, as required by law and accepted professional standards;

b. Whether Defendants fail to provide foster children with legally required services, consistent with accepted professional standards, that are necessary to prevent the children from deteriorating while in Defendants' custody, including appropriate medical and educational services; and

c. Whether Defendants fail expeditiously to take reasonable steps to seek and secure for the children in their custody a permanent, legally stable family, as required by federal law and accepted professional standards.

123. Questions of law common to Plaintiffs and their putative class members include:

a. Whether Defendants' actions and inactions violate rights secured to Plaintiffs and the members of

the class they seek to represent by the First, Ninth and Fourteenth Amendments to the United States Constitution; and

b. Whether Defendants' actions and inactions violate rights secured to Plaintiffs and the members of the class they seek to represent by the Adoption Assistance and Safe Families Act and the EPSDT provisions of the Social Security Act.

124. The legal claims alleged by the Plaintiffs are typical and representative of those of the members of the putative class. The injuries Plaintiffs have and continue to suffer are typical of the injuries the proposed class members have suffered and continue to suffer. Declaratory and equitable relief addressed to the putative class members' claims and injuries will address equally the claims and injuries of the individual named Plaintiffs.

125. The representative Plaintiffs will fairly and adequately protect the interests of the class. They bring this action through their well-qualified representatives, including guardians ad litem and next friends. They are represented by geographically diverse competent counsel including board-certified civil trial and appellate lawyers and attorneys with experience in class action litigation and child advocacy.

126. The Defendants have acted and refused to act on grounds generally applicable to all members of the class, making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

127. Although they are the legal custodians of the Plaintiffs and all members of the putative class, Defendants have an inescapable and inherent conflict of interest with these children and cannot bring this action against themselves on behalf of these children.

2. The Subclass of Black Foster Children

128. Plaintiffs Paul B., Leslie F., Laurie S. and Lillie S., Tammy G., Leanne G., Melinda and Karina bring this action on behalf of themselves and all others similarly situated pursuant to Rule 23 (a) and 23 (b) (2) of the Federal Rules of Civil

Procedure. The subclass consists of all children who are Black or are perceived by Defendants as being Black and are or will be in the custody of Defendants as an alleged or dependent child. All putative subclass members are also members of the system-wide class of foster children that all Plaintiffs seek to represent, and the allegations concerning the class as a whole are incorporated here by reference.

129. Every Black child in foster care is directly and adversely affected by the Defendants' racially discriminatory operation of Florida's foster care system.

130. Plaintiffs Paul B., Leslie F., Laurie S. and Lillie S., Tammy G., Leanne G., Melinda and Karina are members of the subclass they seek to represent; each such Plaintiff and each putative class member is in Defendants' custody, with the possible exception of Melinda, who, if she is not in Defendants' custody, was coerced or misled by Defendants into leaving foster care.

131. The subclass is so numerous that joinder of all subclass members is impracticable. There are presently at least 6,000 Black children in Florida foster care, including foster home care, residential group care and emergency shelter care, and this number is increasing.

132. There are questions of law or fact that are common to Plaintiffs Paul B., Leslie F., Laurie S. and Lillie S., Tammy G., Leanne G., Melinda and Karina, and the members of the subclass they seek to represent, and the claims of these Plaintiffs are typical of the claims of the other subclass members.

133. The common questions of fact shared by Plaintiffs Paul B., Leslie F., Laurie S. and Lillie S., Tammy G., Leanne G., Melinda and Karina and the members of the subclass they seek to represent include:

a. Whether Defendants treat Black foster children differently from White children in Defendants' custody because of their race or color, in the provision of foster care or adoption services to them, such as providing safe, secure, stable foster care placements; prosecuting

termination of parental rights proceedings; and placing children in adoptive or other permanent homes; and

b. Whether Defendants utilize racially neutral criteria or methods of administering foster care and adoption services that have a disparate impact on Black foster children or have the effect of defeating or substantially impairing the accomplishment of the objectives of such foster care and adoption services for Black foster children.

134. Questions of law common to Plaintiffs and their putative subclass members include:

a. Whether Defendants' treatment of Black foster children with respect to the provision of foster care or adoption services constitutes illegal discrimination on the basis of race or color in violation of Tile VI of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000d, et seq. and the regulations promulgated under the Act; and

b. Whether the racially neutral criteria or methods of administering foster care and adoption services used by Defendants have the effect of illegally discriminating against Black foster children on the basis of race or color in violation of Tile VI of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000d, et seq. and the regulations promulgated under the Act.

135. The legal claims asserted by Plaintiffs Paul B., Leslie F., Laurie S. and Lillie S., Tammy G., Leanne G., Melinda and Karina are typical and representative of those of the members of the putative subclass. The injuries these Plaintiffs have and continue to suffer are typical of the injuries the proposed subclass members have suffered and continue to suffer. Declaratory and equitable relief addressed to the putative subclass members' claims and injuries will address equally the claims and injuries of Plaintiffs Paul B., Leslie F., Laurie S. and Lillie S., Tammy G., Leanne G., Melinda and Karina.

I36. Plaintiffs Paul B., Leslie F., Laurie S. and Lillie S., Tammy G., Leanne G., Melinda and Karina will fairly and

adequately protect the interests of the subclass. They bring this action through their well-qualified representatives, including guardians ad litem and next friends. They are represented by geographically diverse, competent counsel including board-certified civil trial and appellate lawyers and attorneys with experience in class action litigation, child advocacy and claims of discrimination on the basis of race or color.

137. The Defendants have acted and refused to act on grounds generally applicable to all members of the subclass, making appropriate final injunctive relief and corresponding declaratory relief with respect to the subclass as a whole.

F. STATEMENT OF FACTS

138. Plaintiffs incorporate paragraphs 1 through 135 into the Statement of Facts.

1. Violations of Foster Children's Substantive Due Process Rights

139. Because plaintiffs and the putative class members are in government custody and wholly dependent on the government for protection of all aspects of their health and well-being, Defendants are obligated under the Due Process Clause of the Fourteenth Amendment to the United States Constitution: to meet these children's basic needs for food, clothing, shelter, and medical, educational and other services, either by providing the needed service or ensuring the service is provided; to provide safe care and a placement that protects Plaintiffs and the putative class members from unnecessary harm, injury or deterioration and neither contravenes accepted professional standards of social work practice nor undermines, impairs or adversely affects their well-being, health, development or education; to provide or ensure the provision of the services these children need to prevent harm, injury or deterioration from occurring; to provide or ensure the provision of the services, help and protection Plaintiffs and the putative class members need to ameliorate any harm, injury or deterioration caused or exacerbated by the actions or inactions of

Defendants; to provide care to Plaintiffs and their putative class members that, in terms of their nature, conditions and duration, are consistent with the purposes for which Defendants assumed custody of these children. In each category, the required services and care must be sufficient to provide a safe environment in which Plaintiffs and the putative class members do not deteriorate.

140. Defendants have engaged in a pattern and practice of failing to fulfill these obligations to Plaintiffs and the putative class members in a variety of ways, as described below. In all such manifestations, Defendants have acted to the detriment of Plaintiffs and the putative class members as a consequence of Defendants' failure to exercise competent professional judgment in the decisions they make and the actions they take and fail to take concerning these children.

141. The problems faced by children in Defendants' custody are both epidemic and long-standing. The Defendants have failed to discharge their legal responsibilities to Plaintiffs and the putative class members. Indeed, continued overcrowding and inadequately supervised foster homes and other out-of-home care facilities, resulting from Defendants' pattern and practice of not timely and properly moving children to permanency, expose children in Defendants' custody to the imminent risk of sexual and other abuse, neglect and other dangers while they remain in Defendants' care.

142. Defendants routinely fail to screen, oversee, monitor and visit the foster and pre-adoptive homes and foster and shelter facilities in which they place Plaintiffs and members of the putative class. Defendants, in fact, operate the foster care system with a much greater tolerance for child abuse committed by their own foster parents, group home parents and institutional personnel than by children's biological families. Defendants have, as part of a pattern and practice, knowingly placed and retained Plaintiffs Tanya M., Hugh S., Sandra M., Laurie S. and Lillie S., Elaine R., Paul B., Matthew I., Rachel, Reggie B., John J., Leanne G., Tammy G., Cathy W., Melinda and Karina, Sandra

M., Leslie F., Larissa, and other members of Plaintiffs' putative class, in foster care placements that were dangerous, abusive, neglectful, overcrowded, or wholly inappropriate to and incapable of meeting the children's individual needs.

143. Defendants have a pattern and practice of ignoring or inappropriately responding to complaints and other information identifying individual foster, shelter and pre-adoptive placements as dangerous, abusive, neglectful, overcrowded or inappropriate for specific children in Defendants' custody, including complaints concerning the placements of Plaintiffs Tanya M., Laurie S. and Lillie S., Matthew I., Tammy G., John J., and Leslie F., and other members of the putative class.

144. Defendants' pattern and practice of placing children in their custody into dangerous and overcrowded foster care settings and failing to respond adequately to complaints about such placements violate accepted professional standards, do not represent the exercise of competent professional judgment, are inconsistent with the purpose for which the children were taken into Defendants' custody, have caused and continue to cause Plaintiffs and their putative class members serious injury, and are known to Defendants, who through their deliberate indifference have failed to remedy them.

145. In January 1995, a Grand Jury in Palm Beach County released a report, finding that: "Children alleged to be abused, neglected or abandoned in Palm Beach County are at significant risk for further abuse if they are taken into the custody of the Department of Health and Rehabilitative Services." (January 13, 1995 Grand Jury Report, p. 1.) [The Department of Health and Rehabilitative Services is DCAF's predecessor agency].

146. A major contributing factor to the placement and retention of Plaintiffs and the putative class members in dangerous, abusive, neglectful, overcrowded and inappropriate placements is the large workload of Defendants' caseworkers, their high level of turnover, and the lack of adequate and

meaningful supervision, training and management of the caseworkers, all of which lead to inadequate supervision and oversight of children in Defendants' custody.

147. In a budget document Defendants prepared for FY2000-01, they project that they need an additional 833 DCAF out-of-home counselors to meet the professionally accepted workload standard for this type of caseworker. DCAF out-of-home counselors supervise and provide services to children and their families while the children are in foster care or relative placements and during the first six months following a child's reunification with the biological family. Defendants, however, have requested funding for only 104 out-of-home counselors (12.5% of the need as calculated by Defendants). Similarly, they are seeking only half the needed increase in both non-supervisory support personnel, whose functions are essential to the efficient use of the out-of-home counselors, and family support workers, who are intended to free the out-of-home counselors to concentrate on their primary mission of working with the child, parents and foster parents to achieve permanency for the child (Budget Document at 152-156.)

148. As a result of excessive workloads, Defendants' out-of-home counselors do not visit Plaintiffs and the putative class members in their placements with sufficient frequency or in a manner that is adequate to ensure such children's safety. Such failure contravenes accepted professional standards, does not represent the exercise of competent professional judgment, has harmed and continues to harm Plaintiffs Jay D. and Candice D. and other putative class members. Defendants permit this practice of failing to visit and supervise children in out-of- home placement to continue as a result of their deliberate indifference to the children's need for safety.

149. Also significantly contributing to the placements and retention of Plaintiffs and their putative class members in dangerous, abusive, overcrowded, neglectful or inappropriate placements is Defendants' failure to develop, and the resulting lack of a sufficient number and array of placements, to facilitate

Defendants' selection of a safe and appropriate placement for each child in their custody. Defendants are fully aware of the lack of an adequate number and array of appropriate placement and have acted with deliberate indifference to the plaintiffs' and class members' need for safe and appropriate placements.

150. Defendants have knowingly engaged in a pattern and practice of placing some foster children, including Plaintiffs Leslie F., Sandra M., Rachel C., Paul B., Hugh S. and Tammy G., on a long-term basis in a temporary shelter or in a group placement because of the unavailability of a foster home that will accept the child. These placements are inappropriate, contravene competent professional judgment, and have harmed and continue to harm these Plaintiffs and other class members.

151. While Defendants have failed to develop an array of foster care settings in sufficient number's to ensure a safe and secure placement for each foster child, this deficiency is particularly glaring with respect to certain types of placements. Among these are foster homes for large sibling groups and teenagers. DCAF has recognized the need to focus its recruitment efforts on these types of placements (Defendants' web site, www.state.fl.us/cf_web/fs/fostercare/issues.html, but has failed to take adequate and reasonable steps to address this acknowledged need.

152. As a result of the lack of foster homes for large sibling groups, Defendants unnecessarily separated Plaintiffs Tanya M., Reggie B. and Rebecca B., Laurie S. and Lillie S., Tammy G. and Leanne G., Leslie F., Elaine R., and Melinda and Karina and other class members from their siblings. As a result of a lack of foster homes and other placements for teens, Plaintiff Hugh S., Paul B., Rachel C., Sandra M., Tanya M., Leslie F., Melinda and Karina and other class members have been placed in dangerous and wholly inappropriate placements. Defendants' failure to recruit, develop and maintain a sufficient number of foster homes for large sibling groups, teenagers, and other groups of foster children who have a foreseeable need for earmarked foster homes violates accepted professional standards, has

harmed and continues to harm Plaintiffs Tanya M., Reggie B. and Rebecca B., Laurie S. and Lillie S., Tammy G., Leanne G., Leslie F., Elaine R., Melinda and Karina and Hugh S. and other class and members.

153. Defendants know Plaintiffs and their putative class members have been and continue to be placed and retained in dangerous, abusive, overcrowded, neglectful or inappropriate placements but have failed to address or remedy that practice or the underlying actions and inactions that cause or significantly contribute to it.

154. In Defendants' budget document, they state:

> There has been a significant increase in the need for out of home care placement options for children who have been identified as victims of child abuse or neglect. Over the next two years the department is expecting continued increases in the number of children requiring out of home care placements. There has not been a parallel increase in the number of available foster homes or specialized group homes for children who need to be placed out of their homes. This has resulted in over-crowded conditions in current foster homes and other related facilities. This has caused some districts to pay for children and staff to be housed in motels. The overcrowding of foster homes places children at serious risk of being harmed by other children; places unrealistic expectations for care and supervision on foster parents; and ultimately leads to their rapid turnover.

Foster homes are also overcrowded because the population needing placement continues to rise, in part, because Defendants fail to achieve adoption or other type of discharge expeditiously for the children already in foster care.

155. Even if Defendants are able to develop the needed out-of-home placements, they will not have an adequate number

of out-of-home counselors and supervisors to supervise and serve the children in these placements. Defendants will, therefore, continue to fail to fulfill their obligation to protect Plaintiffs and the members of the putative class. Given the out-of-home counselors' workload, it will simply be impossible to supervise these children's placements adequately.

156. Children require stability and security to grow and develop. It is contrary to sound professional judgment to move a child from foster care placement to foster care placement except in extraordinary circumstances when the movement is needed to protect the child from harm or to provide a specialized placement that is designed to meet the child's specific needs. Multiple moves, including night-to-night placements, and sleeping in motels instead of houses are needlessly, inescapably traumatic to a child, undermining the child's stability and security, and causing the child to suffer an injury.

157. Defendants have a pattern and practice of moving children in their custody repeatedly in contravention of competent professional judgment and have knowingly permitted this practice to continue as a result of their deliberate indifference to the children's need for a safe, stable and appropriate placement. In some cases, these moves have been caused by Defendants' initial failure to exercise professional judgment that resulted in the child's placement in a dangerous, abusive, neglectful, overcrowded or inappropriate foster home or facility, from which the child then had to be removed. This pattern and practice of subjecting children in Defendants' custody to multiple, unwarranted placements has injured Plaintiffs Tanya M., Hugh S., Sandra M., Laurie S. and Lillie S., Reggie B., Tammy G., Paul B., Leslie F., Jay D. and Candice D., Melinda and Karina, and Bonnie L., and other members of the putative class.

158. A factor that contributes to Defendants' repeated replacement of foster children into new settings is Defendants' lack of an efficient and competent mechanism or procedure for locating vacant foster care beds, identifying the characteristics of

the children for whom the foster homes and facilities with vacancies would be appropriate, matching the children in need of a placement with appropriate vacancies, and expeditiously placing each child in an appropriate placement. Defendants are fully aware of the lack of such a process, but have not remedied this deficiency as a result of their deliberate indifference to the children's need for a safe, stable and appropriate placement. The absence of a mechanism for identifying settings that are appropriate for each child in need of a placement contravenes professional standards and precludes Defendants from exercising competent professional judgment in selecting placements for children in their custody. Plaintiffs Paul B., Tanya M., Cathy W., Sandra M., Rachel C. Laurie S. and Lillie S., Hugh S., Reggie B. and Leslie F. and other putative class members have been or will be placed in inappropriate placements, requiring subsequent replacement, and have been or will be harmed as a result.

159. Defendants often move children to a new placement because the foster parent has demanded the child's removal, frequently because of the child's allegedly disruptive behavior. Children who have undergone abuse or neglect that is sufficiently serious to require their removal from their biological families have suffered such great trauma that disruptive behavior can be expected from them. Indeed, Defendants recognized this in their Budget Document:

> Many children placed in foster care display serious chronic and disruptive behaviors as a result of the trauma and loss they have experienced. Foster parents need techniques and tools to help them manage these extremely difficult behaviors. Foster parents frequently request that children be removed from their homes because of the children's disruptive behaviors.

(Budget Document, at 156).

160. Defendants violate accepted professional standards

by failing to prepare foster parents to deal with the predictable behavior of the children placed in their homes, although Defendants have foreseen both this type of behavior and how it undermines the stability of placements, and by failing to support the foster parents with services and other types of help to make it possible for the child to be maintained in the foster home. Defendants have thus acted with deliberate indifference to the children's need for safe, stable and appropriate placements. This deficiency has harmed and continues to harm Plaintiffs Sandra M., Tanya M., Reggie B., and Leslie F., and other members of the putative class.

161. Defendants also have a pattern and practice of failing to identify relatives who are competent and willing to provide safe and appropriate care for children in Defendants' custody. If Defendants assessed and utilized these capable family members as placement resources, instead of ignoring or actively discouraging relatives (which is currently the case), Defendants would: partially relieve the overcrowding in existing out-of-home placements; avoid placing children in dangerous, abusive, neglectful or inappropriate placements; provide the children placed with relatives with the most appropriate care available; and facilitate the placement of
siblings together and foster children's visitation with their separated siblings. It would also increase the likelihood that the children would expeditiously achieve permanent placements and be provided with permanent families.

162. Defendants have injured Plaintiffs Laurie S. and Lillie S., Reggie B. and Rebecca B., John J., Bonnie L., and other members of the putative class by ignoring or actively discouraging possible relative placements and, instead, placing these children into dangerous, abusive, neglectful or overcrowded stranger-placements that were not appropriate and could not meet these children's individual needs. This practice violates accepted professional standards and does not reflect the exercise of competent professional judgment. Defendants, moreover, know of both the insufficiency of the number and

array of out-of-home placements available to care for the children in their custody and the policy and practice of failing to use relatives or discouraging them from being foster or adoptive resources. Defendants have acted with deliberate indifference to Plaintiffs' and the putative class members' need for appropriate and safe placements.

163. Defendants have a pattern and practice of excluding from the decision-making process concerning individual foster children, the foster children themselves and some responsible adults who are deeply involved with the children and possess critically important information about them. This practice violates accepted professional standards, is outside the scope of professional judgment and defies logic. It has injured Plaintiffs Jay D. and Candice D., Melinda, and Bonnie L. and other putative class members by depriving them of even the possibility that Defendants will engage in fully informed and competent decision-making concerning matters that are critical to the children's well-being and development. Defendants know of this pattern and practice and its detrimental effect on the life-altering decisions made concerning children in their custody, but have been deliberately indifferent to its existence and effect on children and have failed to stop it from occurring.

164. Defendants routinely fail to provide children in their custody with needed medical care for acute, chronic and congenital conditions or with treatment prescribed by a physician. This pattern and practice, which is known to Defendants, contravenes accepted professional standards and reflects both a failure to exercise professional judgment and deliberate indifference to the medical needs of Plaintiffs and the putative class members. Defendants have thereby injured and continue to injure Plaintiffs Matthew I., Reggie B. and Leanne G. and other members of the putative class.

165. Defendants have a pattern and practice of allowing children in their custody and care to be subjected to the administration of psychotropic medications for the purpose of making it more convenient and easier to care for these children

in an out-of-home setting, rather than for the improvement of the child's mental or emotional health. The administration of such mind-altering drugs for a non-therapeutic purpose unreasonably and unnecessarily restrains these children's liberty and contravenes accepted professional practice. Defendants have undertaken this practice without the exercise of professional judgment and with deliberate indifference to the health and well being of the affected children. Plaintiffs Melinda and Karina and other members of the putative class have been subjected to this practice, which is known to Defendants and these children, have suffered serious injuries as a result.

166. Defendants systematically deprive children in their custody of access to an education. As a consequence of moving children from one placement to another, children's education is interrupted and impaired. Defendants do not monitor the educational performance of children in their custody to determine whether the child's educational performance is deteriorating or the child requires assistance in meeting educational goals. Defendants also routinely fail to provide educational assistance when a child in their custody needs it. Defendants do not ensure that children in foster care who have special educational needs have those educational needs met. The denial and interruption of the education of Plaintiffs Hugh S., Paul B., Leslie F., Melinda, Karina and other members of the putative class have resulted from Defendants' failure to exercise competent professional judgment. Defendants are aware of these systemic failings, but have acted with deliberate indifference to the children's educational needs, thereby seriously injuring these children.

167. Defendants have a pattern and practice of failing to provide children in their custody with adequate clothing or a timely paid clothing allowance, and as a result children in Defendants' custody are deprived of adequate and season-appropriate clothing. Defendants' Budget Document states: "Despite annual inflation, the clothing allowance has not been changed in six years. The current clothing allowance is

critically insufficient." Defendants' pattern and practice of failing to provide Plaintiff Hugh S. and other members of the putative class with adequate clothing injures these children, deprives them of a basic need, violates accepted professional standards. Defendants fail to provide foster children with adequate clothing because they do not exercise professional judgment in determining how to meet foster children's basic needs and they are deliberately indifferent to those needs.

168. Defendants have a pattern and practice of attempting to reunify foster children with their biological families when doing so remains obviously dangerous to the child. Defendants' obligation to prevent children in their custody from being harmed encompasses the decision whether it is safe to return a child to the biological family, as well as the decision to place a child in a particular foster, shelter or pre-adoptive placement.

169. Based on Defendants' own data, during the period covering the fourth quarter of FY98-99 through the second quarter of FY99-00, only 23.9% of the children in a licensed home or group care facility who exited foster care did not re-enter foster care within twelve months. Thus, 76.1% of these children did re-enter government custody within twelve months, indicating their biological families pose an immediate danger to their safety, health or well being. Defendants' performance (23.9%) fell far short of Florida's own standard that over 95% of the children should not reenter foster care within twelve months, as well as the State's interim goal that 70% of the children should not reenter care. Every DCAF district was identified as "Attention Needed" on this performance indicator. (Florida Department of Children and Families, "April 2000 Situation Report," Table FSP-026).

170. Defendants' decision that these putative class members should be discharged from foster care created a known and imminent danger to them, was contrary to competent professional judgment, was undertaken with deliberate indifference to the children's safety, and caused these children

serious injury. Moreover, every Plaintiff, with the possible exception of Melinda, and every putative class member currently in Defendants' custody are at immediate risk that Defendants will decide they should be discharged home without an adequate assessment of the safety of the parental home.

171. Children are placed into Defendants' custody in order to provide them with temporary care that is safe and appropriate because their biological families are unable or unwilling to do so. Except in extremely rare situations, retaining children in government custody for long periods of their childhood is not reasonably related to the reason the children were taken into government custody and is contrary to competent professional judgment.

172. Defendants have a pattern and practice of retaining children in foster care for longer periods than is necessary or appropriate. Plaintiffs Laurie S. and Lillie S., Sandra M., Hugh S., Reggie B. and Rebecca B., Melinda and Karina, Bonnie L., Jay D. and Candice D., Leslie F. and other members of the putative class have been held in foster care for an unnecessarily long period of time, have thereby been deprived of an opportunity for a permanent family, and have been seriously and permanently injured. Defendants have retained these children in foster care for excessive amounts of time because they have failed to exercise professional judgment in identifying and implementing the reasonable steps needed to discharge these children to an appropriate permanent living arrangement with their biological family, through adoption or otherwise.

173. Not only does an extended stay in "temporary" foster care harm a child by depriving him or her of the stability and support of a permanent family, but, as Defendants know, the longer children are in foster care: the less likely they are to be adopted; the more likely they are to be abused by their DCAF-approved custodians or others in the DCAF-selected placements; the more likely they are to be moved into new placements and consequently into new schools, disrupting both their development and education; and the more likely they are to

become truant, delinquent, or both. Each of these consequences has caused or will cause additional injury to Plaintiffs Hugh S., Paul B., Rachel C., Cathy W., Melinda, Karina and other putative class members. Additionally Defendants' practice of keeping children in foster care for unreasonably long and harmful periods of time causes the foster care population to increase, resulting in even further overcrowding and greater risk of harm.

174. According to Defendants' own data, dependent children in licensed homes and group homes as of May 2000 remained in Florida foster care for an average of 33.8 months. In Miami-Dade County, the average length of stay was 55 months. For Florida's foster children, the average length of st ay exceeds the 12 month standard recognized by the state, and the longer 18 month federal standard. As of May 2000, only 28.7% of the dependent children in licensed foster homes and group care left Defendants' custody within the twelve month time frame adopted by the State of Florida. In Miami-Dade County, only 11.4% of the foster children exited care within twelve months. Conversely, Defendants have recognized that having 72% of the children exit care within twelve months is the federal target and 80% constitutes "good" performance. The abysmal result of the Defendants' pattern and practice of needlessly keeping foster children in custody for longer than the pertinent federal and state time limits is evident from the Defendants labeling all the districts as "Attention Needed" on this indicator. (Florida Department of Children and Families, "April 2000 Situation Report," Tables FSP-003, FSP-027).

175. When a child is first removed from the biological family, accepted professional judgment requires in most cases that Defendants provide necessary services to the biological family to attempt to facilitate reunification, assuming the parents are alive and their whereabouts are known. In most cases, this requires the assessment of the biological family's needs and provision of services designed to ameliorate the problems that necessitated the child's placement. Unless Defendants make

some attempt to facilitate reunification, their efforts to move the child to permanency through adoption may be precluded or significantly delayed, even when adoption appears to be the only avenue to permanency open to the child. Defendants have a patten and practice of failing to provide the services needed by the biological families of children in out-of-home care, delaying reunification even where it is appropriate.

176. If reunification with the child's biological family cannot be safely accomplished within a reasonable amount of time, accepted professional standards require the government foster care agency to secure an alternative permanent family for the child, either with a relative or through adoption. When adoption is the appropriate approach to achieving permanency, Defendants must petition for termination of parental rights and, concurrently locate and approve a qualified and appropriate adoptive family. Failing to take these steps when adoption is appropriate does not represent competent professional judgment, deprives the child of a real family and causes a permanent and serious injury to the child.

177. Defendants' most recent available data show that for FY1998-99, only 68.2% of the children eligible for adoption were actually adopted, although the State's own standard was 90%. [Defendants asserted that "about 88% is an upper limit on this measure in Florida"] . As poor as Defendants' performance is on this measure, it deceptively does not take into account the thousands of children who should be available for adoption but for whom Defendants have as yet failed to take the steps needed first to change their permanency goal and then to free them for adoption. Defendants further stated that the "denominator for this measure includes many children who have not yet been placed and some who will never be placed." (Florida Department of Children and Families, "Summary Report of FY1998-1999 Performance Based on Exhibit D-2A," (August 31, 1999), at 10. (Emphasis supplied).

178. Defendants have a pattern and practice of too quickly giving up on finding adoptive families for children who

cannot be returned to their biological families or placed permanently with a relative. Plaintiffs Bonnie L. and Sandra M. and other members of the putative class have been and continue to be seriously harmed by this practice, which is well known to Defendants.

179. For years, Defendants have attempted to excuse or justify their failure to comply with accepted professional standards concerning the inappropriateness of keeping children in government custody for extended periods of time by claiming not to be able to find adequate adoptive homes, or sufficient foster homes for that matter. For thousands of children, Defendants do not even look for families. Defendants, moreover, wait such an unacceptably long time to begin to consider and work toward adoption that the children have been seriously damaged by their foster care experience, making it increasingly difficult to find adoptive homes willing and able to care for them. This pattern and practice has been identified and condemned by many over the years, including the 1978 Dade County Grand Jury, yet still shamefully continues without interruption. Defendants' perception that it is impossible to recruit a sufficient number of adoptive homes has resulted in foster children being deprived of their right to Defendants' professionally competent efforts to seek and obtain a permanent, legally secure family for them. Further, if the system had functioned properly since Defendant Bush's Administration took office in January 1999, the thousands of children who have remained in foster care too long would no longer be in Defendants' custody, but would be children living with loving, stable, permanent families. Instead, a significant number of children in Defendants' custody today (the majority] were already in custody in January 1999; most appear no closer to permanency than they were in January 1999.

180. In order to achieve permanency for foster children more expeditiously, Defendants have identified their need for additional DCAF lawyers and legal support staff. Defendants expect this additional legal staff to increase the initiation and

prosecution of termination of parental rights proceedings and generally to speed children's transit through the foster care system. The end product of achieving these goals would be to improve the children's lives and decrease the foster care population, thus relieving some of the overcrowding in placements. To accomplish these purposes, Defendants found they need to add 497 attorneys, 248 paralegals, and 124 secretaries. Defendants, however, only asked for funding for 25% of the unmet needs: 60 attorneys, 28 paralegals and 16 secretaries. (Budget Document, at 148). Similarly, in connection with the request for additional out-of-home counselors, Defendants stated, "the fact that there is a severe shortage of staff limits the Defendants' ability to be totally successful" in "find(ing] alternatives to placing children in out of home care and to reducing the length of time children remain in care." (Id., at 152). Yet, Defendants asked for only 12.5% (104 of 633) of the unmet need for these critically important workers. [Id].

181. Defendants clearly know children are languishing in Defendants' custody rather than being moved toward having permanent, legally stable families of their own, despite established professional standards that such childhood-long government custody is harmful to children and must be prevented except in the rarest of cases. They have, however, failed to take meaningful steps to ameliorate this long-standing pattern and practice that violates the rights of Plaintiffs and the putative class members. Defendants have acted with deliberate indifference to the need of each child for a safe, legally stable permanent home.

182. A young person between the ages of 18 and 21 years may, in some cases, be allowed to remain in Defendants' custody. Defendants' decisions concerning which individuals will be permitted to remain in foster care past their 18th birthday are arbitrary, capricious and fundamentally unfair. Defendants, in fact, simply decide that some youngsters will be able to extend their stay in foster care while others will not.

183. Defendants' decision not to permit an individual to remain in foster care after reaching 17 years of age can and, for many young people does, create an immediate, known and unnecessary danger to the individual because of the young person's inability to live independently without the protection and support of the government custodian. Many of these youngsters, including Plaintiffs Leslie F. and Melinda, have been in foster care for much of their childhood because Defendants never arranged a permanent family placement for them, and consequently, they have no family or other adults on whom they can rely for financial and other support once they leave foster care. Also like Plaintiffs Leslie F. and Melinda, many of these young people have educational and other deficiencies and problems that were caused or exacerbated by Defendants' actions and omissions, which have rendered these youngsters unable to live independently upon reaching their majority.

184. Defendants have a pattern and practice of making arbitrary and capricious decisions concerning which foster children will be allowed to remain in Defendants' custody after their 18th birthday. These decisions have deprived or imminently threaten to deprive Plaintiffs Leslie F. and Melinda and other putative class members of an important government benefit and to place them in unnecessary, immediate and foreseeable danger created by Defendants' decision to discharge them from care, causing them serious and irreparable injury.

185. Defendants operate a subsidized Independent Living Program that pays directly to a child 16 years of age or older the foster care maintenance payment usually paid to a foster care provider (foster parent or agency) to allow the youngster to live in an unlicensed setting independent of daily supervision of a responsible adult but under the on-going supervision of a DCAF caseworker or other adult approved by DCAF. These benefits can continue past the youngster's 18th birthday. Defendants' decisions concerning which individuals will be permitted to participate in the subsidized Independent Living Program are made without full information from the child

as well as persons with knowledge of the child and are arbitrary, capricious and fundamentally unfair. Again, Defendants simply decide that some youngsters will receive this substantial government benefit and others will not.

186. Neither Plaintiff Melinda nor Plaintiff Leslie F. was selected to participate in Defendants' subsidized Independent Living Program. For these young people, as well as many other putative class members, exclusion from this program deprives them of the opportunity to prepare adequately to live independently once they are discharged from foster care. The denial of the associated Independent Living cash benefit further precludes them from sustaining themselves financially and exposes them to brutal and overwhelming need for the monetary support.

187. Defendants have a pattern and practice of making arbitrary and capricious decisions concerning which foster children will be allowed to participate in the subsidized Independent Living Program and receive the cash payment associated with it. Defendants' decision to exclude Plaintiffs Leslie F. and Melinda and other members of the putative class from the subsidized Independent Living Program has arbitrarily and capriciously deprived them of an important government benefit, causing them serious and irreparable injury.

188. Defendants have consistently disregarded their obligations toward the innocent abused and neglected victims who languish, almost invisibly, in DCAF foster placements. The invisibility is due, at least in part, to Defendants' subversion and misuse of the confidentiality that protects certain records; they misuse the confidentiality to shield themselves and the deficient operation of Florida's foster care system - not the affected children or families - from scrutiny.

189. The 1995 Palm Beach County Grand Jury Report re-recommended areas of change first urged in the December 14, 1993 report of the Fifteenth Circuit Grand Jury, and asked for a statewide Grand Jury. Defendant Bush and his predecessors in office have still not petitioned the Florida Supreme Court to

impanel such a statewide Grand Jury. Indeed, the only known statewide quality assurance review was conducted in 1994 and finalized in 1995; Defendants have intentionally provided no quality control assessment since. it is impossible for Defendants to operate the Florida foster care and adoption programs appropriately and with adequate protection for children in the absence of meaningful programmatic compliance and performance evaluations.

190. Defendants' deliberate indifference to the rights and serious needs of the children in their custody and their pattern and practice of failing to exercise competent professional judgment in the operation of the Florida foster care system have directly and proximately caused Plaintiffs and the putative class members to be deprived of safe placements that meet their basic needs, as well as permanent, legally stable families. All of these violations of the rights of Plaintiffs and the putative class members have resulted in serious physical, mental and psychological injuries to these already damaged and vulnerable children and the irretrievable loss of the opportunity to develop in accordance with their inherent abilities.

2. Violations of Plaintiffs'
Procedural Due Process Rights

191. When state law creates an entitlement to a benefit, Defendants cannot deny the benefit to an individual without providing that person with notice and a fair and adequate procedure for challenging the denial or, in some limited circumstances, without requiring a professional qualified by appropriate training, credentials and experience to determine, through the exercise of independent professional judgment, whether a course of action is appropriate for the individual.

192. The State of Florida has created entitlements on behalf of Plaintiffs and the putative class members that Defendants cannot deny to such children without adequate procedural protections or in an arbitrary and capricious manner. Defendants have failed to provide any procedures for a meaningful administrative hearing or professional review of the

deprivation of these benefits. Among these entitlements are:

a. Caseworker supervision of children in foster care: at least monthly, the DCAF out-of-home counselor will visit the foster child and foster parents in the foster home, Florida Administrative Code, § 65C-13.010(5)(g);

b. Caseworker supervision of children in shelter care: while a child in Defendants' custody is in shelter care, the DCAF protective investigator or service counselor will make at least two contacts with the child per week, at least one of which must be face-to-face with the child and shelter parent or provider; and during the visitation, the DCAF worker must evaluate the condition of the shelter home or facility, whether the licensed capacity of the shelter has been exceeded, the treatment received by the child and other children in the shelter, and other factors that affect the child, Florida Administrative Code, § 65C-12.008(3);

c. Medical care: when there are indications a foster child has sustained a physical injury or is suffering from an illness, a licensed health care professional shall be immediately called or the child shall be taken to the nearest available hospital for emergency care, Fla. Stat. § 984.19(5).

d. Remaining in foster care after reaching majority: an individual may remain in Defendants' custody following the person's 18th birthday (subject to limitations on the duration of the in-care period) if: the individual is enrolled in high school, a program leading to a high school equivalency diploma, or a full-time career education program, or is enrolled full-time or accepted for admittance in a post secondary vocational-technical education program, a community college program leading toward a vocational or an associate degree, or a university or college; the person was committed to the legal custody of DCAF for placement in foster care as a dependent child; and all

other resources have been thoroughly explored and it can be clearly established that there are no alternative resources for placement, Fla. Stat. § 409.145(3); and

e. Participation in the subsidized independent Living Program: a cash benefit and opportunity to live independently under the supervision of a DCAF caseworker or other responsible adult approved by DCAF; Fla. Stat. § 409.165(4) (b) .

193. Defendants, moreover, have not established, nor have they provided to Plaintiffs and the putative class members, a procedure by which they can apply to Defendants either to remain in foster care beyond their 18th birthday or to participate in the subsidized Independent Living Program. In the alternative, if a procedure exists either to apply for or to challenge the denial of either of these benefits, Defendants do not give Plaintiffs and the putative class members notice of such procedures or as in the case of Melinda and some putative class members, coerce and mislead the child into signing documents relinquishing these benefits, expressly ignoring and precluding input from the children's court-appointed attorneys or guardians ad litem.

194. Defendants' failure to establish a process for an administrative hearing or professional review of decisions to deny Plaintiffs and the putative class members the benefits to which they are entitled, or to have an application procedure or give notice of such procedure for benefits for which eligibility criteria exist, constitutes a pattern, practice and policy of depriving Plaintiffs and the putative class members due process of law. Plaintiffs Jay D., Candice D., Matthew I., Reggie B. Leanne G., Leslie F. and Melinda and other putative class members have been and continue to be seriously and irreparably injured as a result of this pattern and practice.

195. Defendants' failure to provide Plaintiffs and the class members with the process that is due when they deny the above-described entitlements to such children constitutes deliberate indifference to the legal rights of these children.

196. The Florida Dependency Court conducts periodic reviews of the legal, custodial and permanency status of each child in Defendants' custody as an abused or neglected child. These review hearings continue at least until a child who is free for adoption has been placed for adoption. The child is a party to the proceeding and has a right to be present at any hearing unless the Dependency Court specifically finds the child's mental or physical condition or age would render a court appearance contrary to the child's best interest. Section 39.01(52), Florida Statutes; Florida Rules of Juvenile Procedure, Rules 8.210, 8.255, 8.415. The Department routinely gives notice to the parties, other than children, of such judicial reviews. Some periodic reviews for some children over 13 years of age are administrative, rather than judicial. They also address the custodial and permanency status of the child. Children with sufficient maturity are entitled to participate in the administrative review. Florida Administrative Code, § 65C-13.019. Defendants are also required to include children,"when appropriate", in DCAF's development of a case plan for the child. Florida Rules of Juvenile Procedure, Rule 8.400. The case plan is the basic operating document for each child in Defendants' custody, describing the on-going appropriateness of government custody and the child's current placement, the services to be provided by DCAF to the child and the child's biolcgical and foster parents need, the child's permanency goal, and other critical planning information. Planning is to include Independent Living and the extension of foster care services beyond the age of 18.

197. To a significant degree, the judicial and administrative periodic reviews and case plans determine what a foster child's present and future life will be like and whether the childwill achieve permanency. These proceedings and plans are of the utmost importance to the child's long and short-term well being, and the child has the greatest stake of any party in their outcome. No other party or participant in these proceedings or in developing the case plan, other than the child's attorney or

guardian ad litem, if one is appointed, has an interest that never conflicts with that of the child.

198. As the child's custodian, Defendants have complete control over whether a child will be able to attend a judicial review hearing, administrative review conference or a case planning conference. A child can attend such a hearing or conference only if informed of it. Children in Defendants' custody are dependent on DCAF to provide transportation to a judicial hearing or an administrative case-planning conference.

199. Statistically, less than 50% of children in the foster care system have a guardian ad litem. At this time, there is no state program of attorneys for these children. So few children are represented by legal counsel that this is statistically irrelevant. Unless an attorney or guardian ad litem has been appointed for a child, Defendants have a pattern and practice of failing to notify children of judicial review hearings and administrative review and case planning conferences and of failing to provide transportation and other services the children need to be able to attend and participate in such hearings and conferences.

200. Defendants also do not have standards for determining when a child would be an appropriate participant in a case planning conference or has sufficient maturity to participate in an administrative review conference. In fact, rarely, if ever, provide children in their custody with an opportunity to participate in such conferences, and Defendants' decision-making on this matter, or lack of it, is arbitrary and capricious. As in Melinda's case, even when an attorney or guardian is appointed, Defendants have a pattern and practice of ignoring said appointees and denying them input, further interfering with and denying foster children their due process rights.

201. Defendants' pattern and practice of denying foster children an opportunity to attend and participate in judicial review hearings and administrative review and case planning conferences deprives them of due process of law and constitutes deliberate indifference to the children's legal rights. Plaintiffs

Leslie F. and Melinda and other members of the putative class have been and continue to be seriously and irreparably harmed as a result of this pattern and practice.

3. Violations of Plaintiffs' First, Ninth And Fourteenth Amendment Rights

202. Children have substantial associational and familial interests in continuing to reside with their siblings when they are taken into, and while they remain in, government custody, absent a compelling reason for their separation. Additionally, except when the separation of siblings is necessary to protect the health, safety or welfare of one of the children, it contravenes competent professional judgment to separate siblings who are in government custody. Only a professional qualified by training, credentials and experience, who exercises independent professional judgment, is capable of making the required determination that placing siblings together would be contrary to the health, safety or welfare of one of the children. The separation of siblings without such a professional's determination, and periodic reappraisal, deprives the children of rights secured to them by the First, Ninth and Fourteenth Amendments to the United States Constitution.

203. In the event a professional determines placing siblings together in an out-of-home placement would be contrary to the health, safety or welfare of one of the children, such children have an associational and familial interest in frequent and regular visitation with each other. It would, moreover, be contrary to competent professional judgment to fail to provide such regular and frequent sibling visitation, absent a finding by a professional, qualified by training, credentials and experience and exercising independent professional judgment, that such visitation would be contrary to the health, safety or welfare of one of the children. The denial of regular and frequent sibling visitation in the absence of such a professional's determination, and periodic reappraisal of the decision, deprives the children of rights secured to them by the First, Ninth and Fourteenth Amendments to the United States Constitution.

204. Defendants have a pattern and practice of separating siblings who are in their custody and depriving them of regular and frequent visitation with each other, although placement together or visitation would not be contrary to the health, safety or welfare of any of the children and despite the absence of a qualified professional's independent determination that the joint placement or visitation would be detrimental to any of the children. Plaintiffs Tanya M., Tammy G., Laurie S. and Lillie S., Leanne G., John J., Melinda and Karina, Elaine R., Leslie F., and other putative class members have been unnecessarily separated from their siblings who are also in Defendants' custody, have been deprived of regular and frequent visitation with their siblings, and have suffered a serious injury as a result. Defendants know of this practice and are deliberately indifferent to its effect on these children.

4. Violation of Plaintiffs' Rights Under the Adoption and Safe Families Act

205. The Adoption and Safe Families Act ("ASFA") , which amended Title IV-E of the Social Security Act, enacted as the Adoption Assistance and'Child Welfare Act of 1980, 42 U.S.C. 670 et seq., imposed new obligations on Defendants, which they owe to Plaintiffs and the members of the putative class as children in government-supported foster care.

206. Under ASFA, Defendants are required to initiate a proceeding to terminate the parental rights to any child who has been in their custody for 15 of the most recent 22 months unless, at the option of the State the child is in the care of a relative or unless (a) Defendants have documented in the case plan a compelling reason for determining that filing such a petition would not be in the best interests of the child or (b) Defendants have not provided to the child's family such services as Defendants deem necessary for the safe return of the child to the child's home, if such provision is required under the Act. 42 U.S. C. § 675(5)(E).

207. Defendants routinely fail to initiate termination of parental rights proceedings on behalf of children in foster care

for 15 of the most recent 22 months, although none of the exceptions are applicable. Defendants also routinely, knowingly and intentionally fail to provide or choose not to provide the services they have determined to be necessary for the safe return of children in their care, thereby depriving those children of the right to permanency conferred by ASFA. These acts are part of Defendants' pattern and practice of deliberate indifference to the serious needs and rights of the children in their custody. Plaintiffs Laurie S. and Lillie S., Sandra M., Hugh S., Reggie B. and Rebecca. B., Melinda and Karina, Bonnie L., and members of the putative class have been injured by these practices of Defendants.

208. ASFA also requires Defendants to have, review, update and provide to each foster parent or foster care provider a health and education record for each child placed in such home or facility. 42 U.S.C. § 675(5)(D). Defendants routinely fail to obtain the required education and health information, review and update it, or provide a record containing the specified information to each foster home or facility in which a child in Defendants' custody is placed. On information and belief, Defendants failed to fulfill these obligations with respect to Plaintiffs Matthew I., Reggie B., Leanne G., Melinda, Karina, other Plaintiffs, and other members of the putative class, and as a result, such children have been injured and have not received needed attention to their health and educational needs.

5. Violations of Plaintiffs' Rights Under the Early and Periodic Screening, Diagnosis and Treatment (EPSDT) Provisions of the Medicaid Title

209. Under the EPSDT provisions of the Medicaid Title of the federal Social Security Act, Defendants are required to ensure that all Florida Medicaid-eligible children up to the age of twenty-one years, including Plaintiffs and the members of the putative class, receive comprehensive physical, developmental and mental health care. Among the services Defendants are required to ensure Plaintiffs and the putative class members receive are:

a. Periodic comprehensive health screens at the age-appropriate intervals deemed proper by a board of medical professionals, including general physical examinations, eye examinations, dental examinations, hearing examinations, lead blood tests, and vaccinations or boosters, all performed by the competent medical professionals; and

b. Any and all follow-up physical health services or treatment deemed necessary to treat or address any condition diagnosed at any periodic screening, performed in a timely manner, regardless or whether any such treatment is otherwise covered by the Florida Medicaid plan.

210. Defendants routinely fail to ensure that Plaintiffs and the putative class members are given general physical examinations, eye examinations, dental examinations, hearing examinations, lead blood tests, and vaccinations or boosters, at the specified times and that these children receive timely and needed follow-up physical health services and treatment. Defendants are fully aware of the EPSDT obligations and the pattern and practice of failing to meet these requirements. As a result of Defendant's failure to fulfill their EPSDT obligations, Plaintiffs Matthew I., Reggie B. and Leanne G. and other members of the putative class have been injured.

6. Violations of the Rights of Plaintiffs Paul B., Leslie F., Laurie S. and Lillie S., Tammy G., Leanne G., Melinda and Karina and the Putative Subclass Under Title VI of the 1964 Civil Rights Act

211. The State of Florida, DCAF and Defendants are recipients of federal financial assistance through the United States Department of Health and Human Services ("DHHS") for the Florida foster care and adoption program and the child welfare services program.

212. Title VI of the 1964 Civil Rights Act prohibits any state program or activity that receives federal financial assistance

from excluding from participation, denying benefits to or subjecting to discrimination, any person on the basis of race, color or national origin. 42 U.S.C. §§ 2000d et seq.; 45 C.F.R. § 80.3.

213. DHHS has promulgated regulations, pursuant to Title VI, that prohibit any state programs or activities that receive federal financial assistance that are subject to the regulations from utilizing criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, or national origin. 42 U.S.C. § 20OOd-1; 45 C.F.R. § 80.3. These regulations apply to the operation of the Florida foster care and adoption program under Defendants' direction and control.

214. Defendants have a pattern and practice of treating Black foster children differently and less advantageously than White foster children, because of their race or color, with respect to access to, receipt of and the quality and value of services and benefits. Such difference in treatment constitutes illegal discrimination on the basis of race or color under Title VI and affects, among other aspects of Defendants' foster care and adoption programs, the number of times foster children are moved from one placement to another, the timing and tenacity with which Defendants pursue permanent families for foster children, and the identification of and placement of the child with an appropriate permanent family. Plaintiffs Paul B., Leslie F., Laurie S. and Lillie S., Tammy G., Leanne G., Melinda and Karina and the members of the putative subclass have suffered and continue to suffer serious and irreparable harm as a result of Defendants' actions that are discriminatory on the basis of race or color.

215. Defendants have a pattern and practice of utilizing racially neutral criteria or methods of administration that have the effect of subjecting Black foster children to discrimination because of their race or color or have the effect of defeating or

substantially impairing accomplishment of the objectives of the foster care and adoption program for Black foster children because of their race or color. Defendants' inadequate operation of the Florida foster care and adoption system injures all children in Defendants' custody, but has an even more deleterious effect on Black foster children than on White foster children. When such racially neutral criteria or methods of administration have an illegal disparate impact by race or color, they constitute discrimination on the basis of race or color proscribed by Title VI.

216. Among the racially neutral criteria and methods of administration Defendants employ that discriminate against Black foster children on the basis of their race or color are the efforts Defendants make to recruit foster and adoptive families, the efforts Defendants make to move foster children expeditiously to permanency, the types, quantity and quality of services and benefits provided to the biological parents or relatives of children in Defendants' custody for the purpose of moving the children to permanency, the process of selecting a foster family or facility that is appropriate for an individual child, and the recruitment and training of DCAF staff who work with foster children.

217. These racially neutral criteria and methods of administration have the effect of subjecting Black foster children to discrimination because of their race or color and have the effect of defeating or substantially impairing accomplishment of the objectives of the foster care and adoption program for them. Plaintiffs Paul B., Leslie F., .Laurie S. and Lillie S., Tammy G., Leanne G., Melinda and Karina and the members of the putative subclass have suffered and continue to suffer serious and irreparable harm as a result of Defendants' practices that have a disparate impact on and disadvantage Black foster children.

G. PLAINTIFFS HAVE NO ADEQUATE REMEDY AT LAW

218. Paragraphs 1 through 137 and 139 through 217 are incorporated herein by reference.

219. Plaintiffs and the putative class members have and continue to suffer irreparable harm by Defendants' above-described acts and omissions and do not have an adequate remedy at law, thereby making appropriate declaratory and injunctive relief.

H. CAUSES OF ACTION

220. Paragraphs 1 through 137 and 139 through 217 are incorporated into each Cause of Action (First through Sixth) set forth below.

1. First Cause of Action - Substantive Due Process

221. The foregoing actions and inactions of Defendants are inconsistent with the exercise of competent professional judgment; deprive Plaintiffs and the putative class members of basic needs while in government custody; create conditions of care, treatment and duration of custody that are inconsistent with the purpose for which Defendants took Plaintiffs and the putative class members into custody; comprise arbitrary and capricious decision-making; and amount to a pattern, practice and custom of deliberate indifference to the serious and constitutionally protected rights and needs of Plaintiffs and the putative class members. As a result, Plaintiffs and the members of the putative class have been deprived of the substantive due process rights conferred on them by the Fourteenth Amendment to the United States Constitution. These rights include, but are not limited to: the right to have their basic need for food, clothing, safe care, shelter, medical care and education met; the right to protection from unnecessary harm, injury or deterioration; the right not to be harmed while in state custody; the right not to be unnecessarily deprived of their liberty by retention in state custody; the right not to have their liberty unnecessarily restrained by the use of chemical agents for non-therapeutic purposes; the right to treatment and care that, in terms of its nature, conditions and duration are consistent with the purposes for which they were taken into government custody, including safety, protection from abuse, neglect and abandonment; the right not to be retained in state custody longer than necessary to

accomplish the purposes to be served by state custody; the right to receive care, treatment and services consistent with the exercise of competent professional judgment; the right to be protected from state-created dangers, including placement in dangerous, abusive, overcrowded or neglectful out-of-home placements or returned to a dangerous condition in the home of the child's biological family; and the right to eligibility determinations that are not arbitrary or capricious.

2. Second Cause of Action - Procedural Due Process

222. The foregoing act ions and inactions of Defendants deprive Plaintiffs and the putative class members of state-created entitlements without providing an adequate and fair procedure, including: a professional review of any failure to provide required caseworker-child contact and visits or to obtain immediate medical consultation when a foster child exhibits an indication of injury or illness; an opportunity to submit an application to remain in foster care after reaching 18 years of age or to participate in the subsidized Independent Living Program; an opportunity for an administrative hearing to challenge an adverse decision on any such application; and notice of any process by which such an adverse decision on an application can be reviewed. Defendants further deprive Plaintiffs and the putative class members of their right to be present and provide meaningful input at judicial review hearings and administrative review and case planning conferences. Such lack of fair and adequate process with respect to the above-listed benefits, hearings and conferences deprives such children of due process of law in violation of the Fourteenth Amendment to the United States Constitution and amounts to a pattern, practice and policy of deliberate indifference to the serious and constitutionally protected needs and rights of Plaintiffs and the putative class members.

3. Third Cause of Action - First, Ninth and Fourteenth Amendments

223. The foregoing actions and inactions of Defendants that unnecessarily separate siblings in Defendants' custody and

unnecessarily deprive such separated siblings of frequent and regular visitation are inconsistent with the exercise of competent professional judgment in violation of the Fourteenth Amendment to the United States Constitution; deprive such children of associational, and familial rights in violation of the First, Ninth and Fourteenth Amendments to the United States Constitution; deprive such children of constitutionally protected liberty interests without adequate or due process in violation of the Fourteenth Amendment to the United States Constitution; and amount to a pattern, practice and custom of deliberate indifference to the serious and constitutionally protected needs of Plaintiffs and the putative class members.

4. Fourth Cause of Action -
Adoption and Safe Families Act

224. As a result of the foregoing actions and inactions of Defendants, Plaintiffs and the members of the putative class are being deprived of rights conferred on them by the federal Adoption and Safe Families Act. These rights include, but are not limited to: the right to have Defendants initiate a proceeding to terminate parental rights when the child has been in Defendants' custody for 15 of the most recent 22 months, unless the child resides with a relative or Defendants have documented a compelling reason not to terminate parental rights; the right to have Defendants offer the child's biological family the services Defendants deem necessary for the safe return of the child to the child's home in order to trigger the child's right to have Defendants initiate a termination of parental rights proceeding; and the right to have Defendants obtain required education and health information, review it, update it, and provide the education and health record to each foster home or facility in which a child is placed. Defendants' failure to fulfill their obligations under ASFA amounts to a pattern, practice and custom of deliberate indifference to the serious needs and federally protected rights of Plaintiffs and the putative class members.

5. Fifth Cause of Action

Early and Periodic Screening, Diagnosis and Treatment.

225. As a result of the foregoing actions and inactions of Defendants, Plaintiffs and the members of the putative class are being denied the rights conferred on them by the Early and Periodic Screening, Diagnosis and Treatment (EPSDT) provision of the Medicaid Title of the federal Social Security Act. These rights include but are not limited to these children's right to receive periodic general physical health examinations administered by competent medical professionals at appropriate intervals determined by a panel of independent health care experts; their right to receive periodic hearing and eye examinations, dental examinations and lead blood tests, administered by competent medical professionals at age-appropriate intervals; their right to receive all necessary childhood vaccinations and boosters at appropriate times; and their right to receive any and all treatments deemed necessary by a qualified medical professional conducting any of the above-mentioned periodic health examinations. Defendants' failure to fulfill their EPSDT obligations amounts to a pattern, practice and custom of deliberate indifference to the serious needs and federally protected rights of Plaintiffs and the putative class members.

6. Sixth Cause of Action - Title VI

226. As a result of the foregoing actions and inactions of the defendants, Plaintiffs Paul B., Leslie F., Laurie S. and Lillie S., Tammy G., Leanne G., Melinda and Karina, and the members of the putative subclass are being denied the rights conferred on them by Title VI of the Civil Rights Act of 1964 and regulations promulgated by the United States Department of Health and Human Services pursuant to Title VI. These rights include but are not limited to the right not to be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance; and the right not to have any state program or activity which receives federal financial assistance utilize

criteria or methods of administration which have the effect of subjecting any person to discrimination on the ground of their race, color, or national origin, or which have the effect of defeating or substantially impairing the accomplishment of the objectives of the programs with respect to individuals of a particular race, color, or national origin. Defendants' failure to fulfill their Title IV obligations amounts to a pattern, practice and custom of deliberate indifference to the serious needs and federally protected rights of Plaintiffs and the putative class members.

PRAYER FOR RELIEF

WHEREFORE Plaintiffs, on behalf of themselves and the members of the class and subclass they seek to represent, request that this Court:

A. Assume and retain jurisdiction over this matter;

B. Determine that this matter may proceed as a class action pursuant to Fed. R. Civ. P. 23(a) and (b)(2);

C. Pursuant to Fed. R. Civ. P. 57 and 28 U.S.C. §§ 2201 and 2202, declare unconstitutional and unlawful: Defendants, failure to provide for Plaintiffs' and the putative class members' basic needs, safety, freedom from harm, freedom from unreasonable restraints on their liberty, care and treatment that is consistent with accepted professional judgment and the purpose for which the children were taken into government custody, freedom from being placed into unnecessary state-created danger, and freedom from arbitrary and capricious actions and decisions that deprive them of benefits to which they are entitled; Defendants' deprivation of state-created entitlements without an adequate and fair procedure; Defendants' unnecessary separation of siblings in government custody and denial of reasonable and frequent visitation of such siblings without proper procedure; Defendants' failure to comply with the Adoption and Safe Families Act and the Early, Periodic Screening, Diagnosis and Treatment provisions of the Medicaid Title of the Social Security Act; and Defendants' discrimination on the basis of race or color in the operation of the foster care, adoption and child

welfare services program for which Florida receives federal financial assistance;

D. Permanently enjoin Defendants from subjecting Plaintiffs and the members of the class they seek to represent to practices that violate their federal constitutional and statutory rights, including those identified in paragraph "C" of this Prayer for Relief;

E. Order appropriate remedial relief to ensure Defendants' future compliance with the Constitution and laws of the United States and their provision of legally mandated services, protection and procedures to Plaintiffs and the members of the class they seek to represent;

F. Appoint an expert panel with full access to Defendants, their agents, records, clients and personnel, to develop and oversee the implementation of a plan for reform, which will ensure that Defendants protect the federal constitutional and statutory rights of Plaintiffs and the members of the class they seek to represent;.

G. Appoint a permanent ombudsman or children's advocate to present the interests of Plaintiffs and their putative class members to Defendants and DCAF, to whom all children in Florida foster care will have open and confidential access and with whom Defendants or their designees with authority to make decisions on Defendants' behalf will meet regularly and frequently to attempt to resolve issues that affect individual or groups of similarly situated foster children.

H. Award plaintiffs their reasonable attorneys' fees and costs pursuant to 28 U.S.C. §§ 1920 and 1988; and

I. Grant such other further equitable and other relief as the Court deems just, necessary and proper to protect Plaintiffs and the members of the class they seek to represent from further harm by Defendants.

Dated: Tallahassee, Florida
August ____ 2000

GIVERS, P.A.
COUNSEL for Plaintiffs
524 E. College Avenue
Suite 2
Tallahassee, FL 32301
T - 850/222-1961
F - 850/222-2153

KAREN GIVERS
Fla. Bar No.: 262005

Co-Counsel for Plaintiffs

Theodore Babbitt, Esquire Fla. Bar No.:091146 Babbitt, Johnson and Osborne, P.A. Suite 200 1801 Australian Avenue South West Palm Beach, FL 33409 Mailing address: P.O. Box 024426 West Palm Beach, FL 33402 T - 561/684-2500 F - 561/684-6308	Robert M. Montgomery, Esquire Fla. Bar No.: 056153 Montgomery & Larmoyeux 1016 Clearwater Place West Palm Beach, FL 33401 T - 561/832-2880 F - 561/832-0887

Barbara C. Burch, Esquire Fla. Bar No.: 0978670 (pending admission pro hac vice) 423 Fern Street, Suite 300 West Palm Beach, FL 33401 T - 561/655-8944 F - 561/655-5269	William M. Chanfrau, Esquire Fla. Bar No.: 0155064 (pending admission pro hac vice) Chanfrau, Chanfrau & Bouch P.O. Box 265880 Daytona Beach, FL 32126 T - 904/258-7313 F - 904/238-1464
Jerold Feuer, Esquire Fla. Bar No. (pending admission pro hac vice) 402 N.E. 36 th Street Miami, FL 33137 T - 305/573-2282 F - 305/573-2285	Rose E. Firestein, Esquire (pending admission pro hac vice) Children's Rights, Inc. 404 Park Avenue South, 11th Floor New York, NY 10016 T 212/683-2210 F 212/683-4015
Daniel Freyberg, Esquire 335 S. Plumosa Street Suite D Merritt Island, FL 32952 T - 407/459-2994 F - 407/459-9790	Robert A. Glenn, Esquire Fla. Bar No.: 159844 (pending admission pro hac vice) Glenn, Rasmussen, et al P. 0. Box 3333 Tampa, FL 33601 T - 813/229-3333 F - 813/229-5946

Leslie Goller, Esquire Fla. Bar No.: 393932 Brown, Terrell, Hogan et al. 233 E. Bay Street, Fl. 8 Jacksonville, FL 32202 T - 904/632-2424 F - 904/353-4419	Michelle Hankey, Esquire Fla. Bar No.: 0827835 (pending admission pro hac vice) 423 Fern Street, Suite 200 West Palm Beach, FL 33401 T - 561/655-8944 F - 561/655-5269
Wayne Hogan, Esquire Fla. Bar No.: 142460 Brown, Terrell, Hogan et al. 233 E. Bay Street, Fl. 8 Jacksonville, FL 32202 T - 904/632-2424 F - 904/353-4418	Robert G. Kerrigan, Esquire Fla. Bar No.: 134044 (pending admission pro hac vice) Kerrigan, Estes, et al. 400 E. Government Street Pensacola, FL 32501 T - 850/444-4444 F - 850/444-4493
Jorge A. Lorenzo, Esquire Fla. Bar No.: 849596 (pending admission pro hac vice) 1001 N. Macdill Ave., Suite A Tampa, FL 33607 T - 813/998-9529 F - 813/998-9329	Marcia R. Lowry, Esquire (pending admission pro hac vice) Children's Rights, Inc 404 Park Avenue South, 11th Floor New York, NY 10016 T - 212/683-2210 F - 212/683-4015

John B. Ostrow, Esquire Fla. Bar No: 124324 Law Offices of John B. Ostrow, P.A. Miami Center Bldg, Suite 1380 201 S. Biscayne Blvd. Miami, FL 33131 T - 305/358-1496 F - 305/371-7999	Bernard P. Perlmutter, Esquire Fla. Bar No.: 455260 Univ. of Miami School of Law 5915 Ponce de Leon Blvd #28 Coral Gables, FL 33146 T - 305/284-3123 F - 305/284-4384
Carolyn Salisbury, Esquire Fla. Bar No.: 074772 (pending admission pro hac vice) Univ. of Miami School of Law 5915 Ponce de Leon Blvd 428 Coral Gables, FL 33146 T - 305/284-4321 F - 305/284-4384	Gregory A. Samms, Esquire Fla. Bar No.: 438863 9th Floor, New Times Towers 2800 Biscayne Blvd. Miami, F1 33137 T - 305/573-2444 F - 305/576-9113
Deborah Schroth, Esquire Fla. Bar No.: 290629 (pending admission pro hac vice) Florida Legal Services 126 W. Adams Street Suite 502 Jacksonville, FL 32202-3849 T - 904/355-5200 F - 904/355-5223	Neil C. Spector, Esquire Fla. Bar No.:280471 (pending admission pro hac vice) 1505 N. Florida Avenue P.O. Box 800 Tampa, FL 33601 T - 813/229-0900 F - 813/229-3323

Susan L. Stockham, Esquire Fla. Bar No.: 342521 (pending admission pro hac vice) 2700 S. Tamiami Tr., Suite 17 Sarasota, FL 34239 T - 941/957-0094 F - 941/957-0084	James Walsh, Esquire Fla. Bar No.: 0796352 (pending admission pro hac vice) 423 Fern Street, Suite 200 West Palm Beach, FL 33401 T - 561/6'55-8944 ext. 243 F - 561/655-5269
John Walsh, Esquire Fla. Bar No.: 0796360 (pending admission pro hac vice) 423 Fern Street, Suite 200 West Palm Beach, FL 33401 T - 561/655-8944 ext. 242 F - 561/655-5269	Roy Wasson, Esquire Fla. Bar No.: 332070 1320 South Dixie Highway Suite 450 Gables One Tower Miami, Florida 33146 T - 305/666-5053 F - 305/666-2636
Dianne Weaver, Esquire Fla. Bar No.: 139778 Krupnick, Campbell, et al. 700 SE 3'd Avenue Suite 100 Ft. Lauderdale, F1 33316 T - 954/763-8181 F - 954/763-8292	Claudia Wright, Esquire Fla. Bar No.: 251569 (pending admission pro hac vice) Gator Teamchild University of Florida Levin College of Law Post office Box 117626 Gainesville, FL 32611-7626 T - 352/392-0412 F - 352/392- 0414

Of Counsel	
Christina A. Zawisza, Esquire Fla. Bar No. 241725 John M. Ratliff Fla. Bar No. 402599 3305 College Ave Ft. Lauderdale, Fla. 33314 T 954/262-6027 F 954/262-3832	

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed on this _____ day of August, 2000 to Maxine S. Ryan, Esquire, Assistant Attorney General, Office of the Attorney General, Civil Litigation Division, 110 S.E. 6th Street, 10th Floor, Fort Lauderdale, Florida 33301-5000 and Cecilia Bradley, Esquire, Assistant Attorney General, Office of the Attorney General, The Capitol - PLO1, Tallahassee, Florida 32399-1050.

_____

KAREN GIVERS
Fla. Bar No.: 262005

(3)

No. 03-351

Supreme Court, U.S.
FILED
OCT 10 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

REGGIE AND REBECCA B., TAMMY G.,
ELAINE R. and RACHEL C.,

Petitioners,

v.

JEB BUSH, as the Governor of the State of Florida, *et al.*,

Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

Karen Gievers
GIEVERS, P.A.
524 East College Avenue, Suite 2
Tallahassee, Florida 32301
850-222-1961

Marcia Robinson Lowry
Counsel of Record
Susan Lambiase
Eric E. Thompson
Douglas C. Gray
CHILDREN'S RIGHTS, INC.
404 Park Avenue South
Eleventh Floor
New York, New York 10016
212-683-2210

(Additional Counsel On the Reverse)

15 pp

William H. Fraser
LEGAL AID SOCIETY OF
PALM BEACH COUNTY, INC.
423 Fern Street, Suite 200
West Palm Beach, Florida 33401
561-655-8944

Bernard P. Perlmutter
Carolyn Salisbury
UNIVERSITY OF MIAMI
SCHOOL OF LAW
5915 Ponce de Leon
Boulevard #28
Coral Gables, Florida 33146
305-284-3123

Thomas Babbitt
BABBITT, JOHNSON, OSBORNE
& LECLAINCHE, P.A.
1450 Centrepark Boulevard
Suite 100
West Palm Beach, Florida 33401
561-684-2500

Wayne Hogan
Leslie Goller
BROWN, TERRELL, HOGAN
233 East Bay Street, 8th Floor
Jacksonville, Florida 33202
904-632-2424

Christina A. Zawisza
CHILD ADVOCACY CLINIC
THE UNIVERSITY OF MEMPHIS
SCHOOL OF LAW
109 North Main Street, 2nd Floor
Memphis, Tennessee 38103
901-523-8822

ROY WASSON
210 South Dixie Highway
Suite 450
Gables One Tower
Miami, Florida 33146
305-666-5053

Deborah A. Schroth
FLORIDA LEGAL SERVICES
126 West Adams Street, #502
Jacksonville, Florida 32202
904-355-5200

Robert Montgomery
MONTGOMERY & LARSON, LLP
1016 Clearwater Place
West Palm Beach, Florida 33401
561-832-2880

TABLE OF CONTENTS

Page

Table of Authorities ii

Argument 1

1. Respondents Mischaracterize The Relief Sought 2

2. There Is A Clear Split Among The Circuit Courts That Must Be Resolved 6

Conclusion 9

TABLE OF AUTHORITIES

Page

Brown v. Feaver, 726 So.2d 322
(Fla. Dist. Ct. App. 1999) 4

Colorado River Water Conservation Dist. v. United States,
424 U.S. 800 (1976) 5

Dep't Health and Rehab. Servs. v. B.J.M.,
656 So.2d 906 (Fla. 1995) 4

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 5

Green v. City of Tuscon,
255 F.3d 1086 (9th Cir. 2001) 6

J.B. ex rel. Hart v. Valdez,
186 F.3d 1280 (10th Cir. 1999) 7-8

Joseph A. ex rel. Wolfe v. Ingram,
275 F.3d 1253 (10th Cir. 2002) 7-8

L.H. v. Jamieson, 643 F.2d 1351 (9th Cir. 1981) 6-7

*Leatherman v. Tarrant County Narcotics Intelligence
and Coordination Unit*, 507 U.S. 163 (1993) 2-3

Lee v. Dep't Health and Rehab. Servs.,
698 So.2d 1994 (Fla. 1997) 4

New Orleans Pub. Serv., Inc., v. Council of the City of New Orleans, 491 U.S. 350 (1989) 5

ARGUMENT

Respondents urge this Court to deny the petition, but do not dispute that this Court's decisions applying *Younger* abstention have been limited to cases where federal plaintiffs were seeking to enjoin state judicial or quasi-judicial proceedings via an injunction or declaratory relief. Unlike in any of those cases, petitioning foster children here do not seek to enjoin ongoing state juvenile court review proceedings, despite respondents' mischaracterizations to the contrary. Instead, they seek systemic relief directed at creating minimum capacity within Florida's foster care system to provide safe foster homes and adequate supervision of, and services to, the foster children in the state's custody as the Constitution requires. The *Younger* abstention doctrine, as articulated in numerous decisions by this Court, should not be expanded to insulate from *any* federal court relief a mismanaged child welfare agency that constitutionally harms children, simply because certain aspects of those children's custodial status is periodically reviewed by the state juvenile courts. This is especially so in the case at bar where the Florida state juvenile courts undeniably lack the jurisdiction to order institutional changes in the child welfare system necessary to ensure the state's capacity to protect children in its custody from constitutional violations.

In addition to mischaracterizing the relief petitioners seek, respondents speculate that if the federal court were, at some time in the future, to order such capacity-building reforms for the child welfare agency to ensure it operates constitutionally, that would somehow interfere with ongoing individual state juvenile court proceedings reviewing individual children's custodial status. However, mere speculation cannot

satisfy the important *Younger* abstention principles set forth by this Court. In fact both the Ninth and Tenth Circuits have recognized in similar child welfare reform litigation that systemic federal court relief requiring constitutionally adequate resources, staffing and management oversight at a child welfare agency can be pursued without interfering with ongoing individual state juvenile court review proceedings. These decisions are in direct conflict with the Eleventh Circuit's decision below and are more consistent with this Court's admonition that *Younger* abstention should only be applied in the narrowest of circumstances. The erroneous decision below warrants review.

1. Respondents Mischaracterize The Relief Sought.

Respondents attempt to reconcile the decision below with this Court's *Younger* abstention jurisprudence by mischaracterizing the relief sought by petitioners. Ignoring petitioners' actual prayer for relief, respondents incorrectly suggest that the relief sought will enjoin (at least as a practical effect) decisions of the Florida juvenile courts in individual foster children's cases as to such matters as placement and medical care. *See* Opp. at 17-18. While respondents are correct that petitioners' amended complaint alleges many *harms* to foster children including dangerous and inappropriate placements and lack of medical care, *id.*, issues that could be reviewed in individual foster children's cases by the state juvenile courts, those harms are alleged in the complaint to be caused by respondents' pattern and practice of poor resource development, allocation and management.[1] *See* Opp. App. 3,

[1] The facts as alleged in petitioners' amended complaint are to be deemed true for the purposes of this petition. *See Leatherman v. Tarrant County*

41-60 ("Defendants have engaged in a pattern and practice" of failing to develop a sufficient array of placements and failing to provide sufficient staffing and staff oversight, supervision, training and management). The *relief* sought is thus not an order for a particular medical treatment or placement for any individual child, but rather an injunction of the systemic "practices" that violate all foster children's federal rights, and a remedial order ensuring the agency's future capacity to provide constitutionally required protection and services. App. 98a-99a. ("Plaintiffs . . . request that this Court: . . . 4. Permanently enjoin Defendants from subjecting Plaintiffs and the members of the class they seek to represent to *practices* that violate their federal constitutional and statutory rights; [and] 5. Order appropriate remedial relief to ensure Defendants' future compliance with the Constitution and laws of the United States and their provision of legally mandated services, protection and procedures. . . .") (emphasis added).

This distinction is not mere semantics. For example, petitioners allege that the state practices of failing to provide sufficient and adequately trained casework staff, *see* Opp. App. 43-44, failing to develop appropriate foster homes and other placements, *id.* 44-46, and failing to ensure appropriate case supervision, *id.* 42-44, 46-47, systemically cause petitioner children to be subjected to harmful foster homes and facilities, *id.* 42-43, 46, and to be deprived of medical care, *id.* 50. A pattern of such deficient state *practices*, including inadequate resource development and allocation and inadequate management oversight, are squarely due to state executive branch actions and cannot be said to be "matters ultimately decided by state dependency courts, not executive branch

---

Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 165 (1993).

officials," as respondents attempt to characterize the subject of petitioners' claims. Opp. at 17.

In fact, it is undisputed that assuring the creation and maintenance of constitutionally adequate capacity within a state agency *cannot* even be the subject of state judicial oversight in Florida under the State's separation of powers doctrine. *See Dep't Health & Rehab. Servs. v. B.J.M.*, 656 So.2d 906, 913-916 (Fla. 1995) ("Decisions as to the allocation of services to children implicate a core discretionary function" protected by Florida's separation of powers and sovereign immunity doctrines from civil liability); *Brown v. Feaver*, 726 So.2d 322, 326 (Fla. Dist. Ct. App. 1999) ("The legislature has not given the courts control over the state's resources, nor could it without a constitutional amendment, and hence, the courts may not direct the Department to use them in any particular manner."). Thus, the state juvenile courts cannot do exactly what petitioning foster children asked the court below to do: review respondents' systemic policymaking, planning and prioritization decisions, including in such areas specifically alleged to be constitutionally deficient here as staffing and caseloads and the Department's maintenance of adequate foster care service arrays to meet the needs of children. *See Lee v. Dep't Health & Rehab. Servs.*, 698 So. 2d 1194, 1198-1199 (Fla. 1997); Opp. App. 43-46. The systemic federal relief requested by petitioners could not conflict with state juvenile court proceedings where there is no jurisdiction there to address those issues.

As to the systemic relief respondents concede petitioners seek, respondents rely on little more than "imagination" to vaguely speculate that federal judicial "implementation of a plan for reform" to address systemic federal violations would "collide" with individual care and custody review decisions by

the state juvenile courts.[2] Opp. at 18. Relying on such speculative interference – especially here, when the case was prematurely dismissed before a finding of liability and before any remedy was ever ordered – is an assault on this Court's caution that abstention is an "extraordinary and narrow exception," *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976) (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959)), and is only appropriate in "carefully defined" situations. *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 359 (1989) (citing David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 570-77 (1985)).

There is in fact no basis in this case for holding that the relief requested would result in the federal court halting or exercising control over the state juvenile court proceedings or over the state courts themselves, as is required for *Younger* abstention. That the Eleventh Circuit could envision a scenario where the federal court and the state court might address overlapping matters is insufficient to bar petitioners from pursuing in federal court the actual relief that they seek. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 928 (1975) ("the interest of avoiding conflicting outcomes in the litigation of similar issues, while entitled to substantial deference in a unitary system, must of necessity be subordinated to the claims of federalism"). This is especially so where allowing the Eleventh Circuit's decision to stand would mean that

---

[2] Unfortunately, the Eleventh Circuit itself relied on a facially erroneous statement that petitioners sought a court-appointed panel with "authority to implement a systemwide plan to revamp and reform *dependency proceedings in Florida*" that would constitute "federal court oversight of state court operations." (App. 37a-38a.) (emphasis added).

petitioning foster children would be left with no judicial remedy for constitutional harms foisted on them by a state agency with inadequate staff, resources and management controls.

2. There Is A Clear Split Among The Circuit Courts That Must Be Resolved.

Respondents' protestations notwithstanding, the Eleventh Circuit's decision below squarely conflicts with other circuits' decisions on the relevant legal issue – the "directness" of the interference with state court proceedings needed to justify *Younger* abstention.[3] Importantly, the decision directly conflicts with both Ninth and Tenth Circuit decisions recognizing that the federal courts should not abstain from and dismiss outright child welfare cases seeking systemic relief that does not interfere with plaintiff children's ongoing juvenile court proceedings.

In *L.H. v. Jamieson*, 643 F.2d 1351 (9th Cir. 1981), the Ninth Circuit reversed the district court's dismissal of the case, holding that a plaintiff class of Arizona foster children was not barred by *Younger* from pursuing systemic relief despite their

---

[3] That not all of the cases cited by petitioners involve children in foster care does not, as respondents apparently contend, render the circuit conflict on this legal issue a mere "phantom." *See* Opp. at 22. *Green v. City of Tuscon*, 255 F.3d 1086 (9th Cir. 2001) (*en banc*), for example, is particularly relevant despite factual distinctions. Though respondents appear to contend the case is simply about whether federal litigation by non-parties to a state proceeding may qualify for *Younger* abstention purposes, that is only the subject of a secondary, alternative holding of the case that follows a rigorous, detailed and entirely apposite primary decision based on the extent to which *Younger* abstention requires direct interference with state judicial proceedings. *See id.* at 1099-1001 & 1093-1099.

ongoing juvenile court proceedings. The relief sought in that case was an order requiring the State's development (and funding) of additional placement alternatives for plaintiff children based on the children's constitutional right to treatment while in state custody. Although such an order could admittedly (and positively) "*affect* [the] pending and ongoing state juvenile proceedings" with continuing jurisdiction over the children's placements, it was not found to *interfere* with those proceedings such as to enjoin them. 643 F.2d at 1354 (emphasis added). Just as in *L.H.*, petitioners here allege that their constitutional rights to services and protection while in custody are being violated by the respondents' system-wide failure to develop and maintain adequate foster homes. *See* Opp. App. 44-46 (alleging that the dearth of placements developed by Florida puts petitioners at risk of harm). A remedial order of the type requested by petitioners here, directing respondents to recruit additional foster homes and develop other placement alternatives for abused and neglected children in state custody, for example, would no more interfere with ongoing juvenile court proceedings than in *L.H.*

In *Joseph A. ex rel. Wolfe v. Ingram*, 275 F.3d 1253 (10th Cir. 2002), the Tenth Circuit also reversed the district court's dismissal of plaintiff New Mexico foster children's class action case based on *Younger* abstention, remanding it for a provision-by-provision analysis of a previously entered consent decree to establish which provisions, if any, so interfered with the daily operations of the juvenile court as to warrant abstention on those provisions.[4] The Tenth Circuit noted in

[4] The Tenth Circuit's decision in *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1291-1292 (10th Cir. 1999), upheld dismissal based on *Younger* abstention because there, unlike in the case at bar, plaintiffs' requested relief would have the federal court making individual "dispositions," such as custodial

particular that relief regarding such areas as training and qualifications of social workers, as well as the development of an adequate management information system, "do not appear to risk interference with state court proceedings." 275 F.3d at 1273. Similarly, petitioners here seek systemic remedial relief addressing the respondents' failure to hire and properly train a sufficient number of caseworkers and provide adequate managerial oversight. *See* Opp. App. 43-44. It is hard to imagine how a remedial order that requires minimum agency staffing and management controls could interfere with ongoing juvenile court proceedings.

Under any reading of petitioners' amended complaint and claim for relief there are innumerable remedies that the federal court could order to protect petitioners' constitutional rights that would not interfere with any aspect of the petitioners' state juvenile court proceedings. This Court should resolve the conflict between the circuits as to whether such a federal suit can proceed.

---

decisions, that "would prevent the Children's Court from carrying out this function" for the three plaintiff children whose claims were at issue. A critical precursor to the Tenth Circuit's decision to affirm the district court's abstention ruling was its affirmance of the district court's denial of plaintiffs' class certification motion, *id.* at 1290 – a judicial determination never made in this case.

CONCLUSION

For the reasons stated above and in petitioners' petition, the petition for certiorari should be granted.

Date: October 10, 2003

Respectfully submitted,

Karen Gievers
GIEVERS, P.A.
524 E. College Avenue,
Suite 2
Tallahassee, FL 32301
850-222-1961

William H. Fraser
LEGAL AID SOCIETY OF PALM BEACH COUNTY, INC.
423 Fern Street, Suite 200
West Palm Beach, FL
33401

Marcia Robinson Lowry
Counsel of Record
Susan Lambiase
Eric E. Thompson
Douglas C. Gray
CHILDREN'S RIGHTS, INC.
404 Park Ave. So., 11th Fl.
New York, NY 10016
212-683-2210

ROY WASSON
1320 South Dixie Hwy.
Suite 450
Gables One Tower
Miami, FL 33146
305-666-5053

Christina A. Zawisza
CHILD ADVOCACY CLINIC
THE UNIV. OF MEMPHIS
SCHOOL OF LAW
109 N. Main St., 2nd Floor
Memphis, TN 38103
901-523-8822

Bernard P. Perlmutter
Carolyn Salisbury
UNIV. OF MIAMI SCHOOL OF LAW
1311 Miller Drive, Suite F305
Coral Gables, FL 33146
305-284-3123

Deborah A. Schroth
FLORIDA LEGAL SERVICES
126 W. Adams St., #502
Jacksonville, FL 32202
904-355-5200

Theodore Babbitt
BABBITT, JOHNSON,
OSBORNE &
LECLAINCHE, P.A.
1450 Centrepark Blvd., #100
West Palm Beach, FL
33401
561-684-2500

Wayne Hogan
Leslie Goller
BROWN, TERRELL, HOGAN
233 East Bay St., 8th Floor
Jacksonville, FL 32202
904-632-2424

Robert Montgomery
MONTGOMERY &
LARSON, LLP
1016 Clearwater Place
West Palm Beach, FL 33401
561-832-2880